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UNDER THE GENERAL EDITORSHIP OF

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A TREATISE
ON THE
LAW OF MORTGAGE
PLEDGES AND HYPOTHECATIONS.

(FOUNDED ON COOTE'S LAW OF MORTGAGES.)

BY
LEOPOLD GEORGE GORDON ROBBINS,
OF LINCOLN'S INN, BARRISTER-AT-LAW

ASSISTED BY
FREDERICK TRENTHAM MAW,
OF LINCOLN'S INN, BARRISTER-AT-LAW

VOL. I.

LONDON:
STEVENS AND SONS, LTD., 119 & 120, CHANCERY LANE
SWEET AND MAXWELL, LTD., 3, CHANCERY LANE
Law Publishers.



PREFACE.

THE present Work originated in a request made to me by the Publishers that I should prepare a Sixth Edition of Mr. Coote's Treatise on the Law of Mortgage. But, on considering this proposal, it seemed to both parties that, having regard to the long period which had elapsed since Mr. Coote's well-known work first appeared, and the considerable changes in the law on the subject which had in the meantime been effected by statutory enactments and judicial decisions, it would be more satisfactory that an entirely fresh attempt should be made to state that law. It was, however, decided that the results of the research and labours of Mr. Coote and his learned Editors should be utilized by full liberty being given to me to incorporate in the present treatise, on my own responsibility, such parts of the Work referred to as I might think fit, of which liberty I have freely availed myself.

This Treatise is therefore to some extent founded on that of Mr. Coote; but while I take this opportunity of acknowledging the great assistance which I have derived from the information and propositions of law contained in that book, I would observe that I have throughout verified and supplemented, and, where necessary, corrected or modified them, by the light of recent statutes and decisions, and I have added a considerable amount

of fresh matter, particularly with regard to company securities.

The scope and method of arrangement of the present Treatise differ entirely from those of Mr. Coote's Work.

The subject-matter of this Treatise is confined to mortgages and other securities arising directly out of contracts for securing loans and debts, and excludes from consideration, except incidentally, all charges arising only by operation of law, such as judgments, *lis pendens*, statutory charges, and liens arising otherwise than by way of contract-security, also charges created by will for securing payment of debts and legacies, and the like.

In arranging the subject-matter of this important and complicated branch of the law, I have endeavoured to treat it consecutively from the inception of a mortgage or charge to its final discharge or extinction.

This Treatise is divided into nine Parts. The first eight Parts deal successively with mortgages and charges of the nature of a mortgage, and are arranged as follows:—

- Part I Of different kinds of mortgages, and of instruments and matters ancillary thereto.
- Part II Of the subject-matter of mortgages
- Part III. As to who may be mortgagors and mortgagees, and as to the effect and form of security as affected by the estate, status, and mutual relations of the parties.
- Part IV. Of void and voidable mortgages
- Part V. Of the estate, rights, liabilities, and remedies of the mortgagor and persons claiming under him.
- Part VI. Of the estate, rights, liabilities, and remedies of the mortgagee and persons claiming under him.
- Part VII Of priority of mortgages
- Part VIII. Of the discharge of mortgages.

In Part IX. is contained a statement of the law as to leases and hypothecations by way of equitable assign-

ment. An Appendix on Stamp Duties will be found at the end of the Work.

I have attempted, as far as possible, to confine the several chapters and sections arranged under the above Parts to the matters indicated by their respective titles. All of them are broken up into divisions with appropriate headings printed in distinctive type, such headings being in substance repeated at the top of every alternate page, with a view of facilitating rapidity of reference.


In the notes to the text, only one reference is given to each case; but I have collected in the Table of Cases references to contemporaneous reports. The statutes and decisions cited in the body of the Treatise are noted up to July, 1897; later references will be found in the "ADDENDA," page ccxxv.

Considerable time and labour has been expended on the Index; and it is hoped that it may prove sufficiently copious and satisfactory in arrangement.

My most grateful acknowledgments are due to Mr. FREDERICK TRENTHAM MAW for his help in the looking up and discussing the effect of cases and statutes, for many valuable suggestions, and generally for careful and assiduous assistance throughout the preparation of this Work. I also tender my best thanks to Mr. ARTHUR TURNOUR MURRAY, Mr. H. J. MONGAN, and Mr. HERBERT BROADBENT, all of the Equity Bar, for their assistance in the laborious task of preparing this book for the press.

L. G. GORDON ROBBINS.

4, STONE BUILDINGS,
LINCOLN'S INN.
September, 1897.



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ADDENDA ET CORRIGENDA.



- Pp. 38—41. The sections of the Land Transfer Act, 1875, set out in these pages, must now be read in connection with Parts II and III of the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), which comes into operation on the 1st January, 1898, so far as relates to such county, or part of a county, as may be prescribed by Order in Council.
- P. 123, note (e). *Add* — *Viscount Hill v Bullock*, (1897) 2 Oh. 55, affirmed W. N. (1897) 80, C. A.
- P. 311, note (z). *For* “ 52 & 53 Vict c 32 ” *read* “ 56 & 57 Vict. c. 53.”
- Pp. 416 *et seq.* The decisions as to implied authority of executors, &c. to mortgage realty by virtue of charges of debts, or other expressions in a will, and also the provisions of Lord St. Leonards’ Act, enabling them to mortgage realty for payment of debts and legacies, appear to be rendered obsolete by virtue of the 2nd section of the Land Transfer Act, 1897, so far as regards cases falling within that Act.
- Pp. 441 *et seq.* As to charges by incumbents of benefices on lands of which they are the registered proprietors, see sect 12 of the Land Transfer Act, 1897.
- P. 463. As to charges by registered proprietors of land in favour of building societies, see sect 9 (2) of the Land Transfer Act, 1897.
- P 549, note (v). The decision in *Re Runney and Smith* has been affirmed, see W N (1897) 66, C. A., but the decision appears to have turned entirely on the construction of the deed, and not to have determined the validity of the transfer.
- Pp. 627 *et seq.* By virtue of Part I. of the Land Transfer Act, 1897 (60 & 61 Vict c 65), ss. 1—5, real estate of a person dying on or after the 1st January, 1898, will devolve to and become vested in his personal representatives for purposes of administration as if it were a chattel real, but so that, after the expiration of one year from the death, the person entitled to the beneficial interest in the estate may require the representatives to convey the land to him.
- Pp 740 *et seq.* As to the bar of the right of redemption of a registered proprietor of land as against the proprietor of a registered charge thereon, see sect 12 of the Land Transfer Act, 1897, see also sect 95 of the Land Transfer Act, 1875.

- P. 909. *Add*, at end of s vii. —When a mortgage comprises land and a policy of life assurance, the mortgagee selling under his power is not entitled to retain the mortgage deed by virtue of sect 2 of the Vendor and Purchaser Act, 1874 (37 & 38 Vict c. 78), which only applies to land, but he must deliver the deed up to the purchaser *Re Williams and Duchess of Newcastle's Contract*, (1897) 2 Ch. 144
- P. 918, note (h). The decision of the majority of the Court of Appeal in *Gaskell v Gosling* has been reversed by the House of Lords, approving the judgment of Rugby, L. J. *Gosling v. Gaskell*, W. N. (1897) 78
- Pp 967 *et seq* The effect of sect 2 of the Land Transfer Act, 1897, appears to be to render in great measure obsolete, in cases falling within that Act, the enactments of the Statutes of Fraudulent Devises and the decisions thereon.
- P. 1027, line 2. *Add* —After the Master has made his certificate finding the amount due for principal and interest up to the date of the certificate, together with interest for six months from the date of the certificate, being the time fixed for redemption, the mortgagor can only redeem in accordance with the certificate. *Hill v. Rowlands*, W. N. (1897) 73, C. A.
- P 1038, note (t). *For* “XLI.” *read* “LI.”
- Pp. 1058 *et seq* As to the bar of the right of foreclosure of a proprietor of a registered charge, see sect 12 of the Land Transfer Act, 1897, see also sect. 95 of the Land Transfer Act, 1875.
- P 1063, note (y). *For* “c. 12” *read* “c. 57.”
- P. 1064 *Add*, at end of s iv. —A purchaser of land subject to a mortgage, which has been in possession of a person claiming adversely to the mortgagor for more than twelve years, is not “a person claiming under the mortgagee” within the meaning of the Statutes of Limitation, so as to give him a right to bring an action to recover possession of the land at any time within twelve years after payment of any part of the principal moneys or interest secured by the mortgage *Thornton v. France*, (1897) 2 Q. B. 143, C. A.
- P. 1141, note (p). *Add* —*Wilding v. Sanderson*, W. N. (1897) 39, affirmed *ibid.* 78, C. A.
- P. 1168, line 10. *For* “r. 64” *read* “r. 63.”
- P. 1213, note (g). *Add* —*Cory Bros. & Co. v. Owners of SS. Mecca*, (1897) A. C 286
- P. 1276, lines 11, 12. *For* “charging order” *read* “charge”, and as to priorities of charging orders, see *post*, p. 1362.
- P. 1304, line 1. *For* “1883” *read* “1873.”
- P. 1371, line 21. *Add* :—Where a testator devised freeholds to trustees for a term of 2,000 years upon trust by mortgage to raise money in aid of his

personal estate for payment of his debts, and, subject thereto, devised the lands in strict settlement, the tenant for life created a rentcharge under the Limited Owners' Residences Act, 1870, charged on the settled lands, and, afterwards, the trustees of the term mortgaged part of the lands for the purposes of their trust, it was held that, at the date of the creation of the rentcharge, the term of 2,000 years was "an incumbrance affecting the land charged" within the meaning of sect 9 of the Act, and that the mortgages created under the term were entitled to rank in priority over the rentcharge. *Provident Clerks' Mutual Life Assurance Assoc v Law Life Assurance Soc*, W. N. (1897) 73.

- P 1389. *Add*, at end of s vi. —Parties to an action knowing of the lien of a solicitor will not be allowed to effect a compromise with the intention of stopping the taxation and defeating the lien *Re Margetson and Jones*, (1897) 2 Ch. 314
- P. 1402, note (i) *After "Peace v Hannes," add "Jordan v Money, 5 H L. C. 185"*
- Pp. 1419 *et seq.* The effect of sect. 1 of the Land Transfer Act, 1897, appears to be to do away with the necessity generally of obtaining vesting orders, in cases falling within the Act, where the heir of the mortgagor is an infant, or out of the jurisdiction, &c, as the legal estate in the mortgaged lands will vest in the personal representatives of the deceased mortgagor, who will be able, and no doubt compellable, to convey it to the mortgagee entitled thereto.

A TREATISE

ON THE

LAW OF MORTGAGES.

Part I.

OF DIFFERENT KINDS OF MORTGAGES, AND OF INSTRUMENTS AND MATTERS ANCILLARY THERETO.

CHAPTER I.

OF MORTGAGES AT COMMON LAW (a).

i.—Vivum vadium.—The common law recognised two kinds of landed security, viz, *vivum vadium* and *mortuum vadium*. The *vivum vadium* and also the *mortuum vadium* (according to Glanville), as at first known, were determinable or base fees, with a right of reverter in the feoffor and his heirs, on the payment of a given sum. The *mortuum vadium*, or mortgage ultimately known at the common law, was an absolute fee, with a condition annexed, making void the feoffment on payment of a given sum, which the common law allowed, if reserved to the feoffor or his heirs. The difference between the estates was striking. In the first instance the creditor took an estate, which, as soon as his debt was satisfied, *ipso facto* ceased, and the feoffor might re-enter and maintain ejectment, in the latter instance the feoffee took the whole estate, subject to be defeated, but which, on the non-fulfilment of a certain engagement, became his own by an indefeasible title. In the first case the defeasibility was an inherent quality of the estate; in the other case the determination was collateral to it.

Distinction
between *vivum*
vadium and
mortuum
vadium

CHAPTER I

Nature and
effect of *vivum*
vadium

The *vivum vadium* consisted of a feoffment to the creditor and his heirs, until out of the rents and profits he had satisfied himself his debt, the creditor took actual possession of the estate, and received the rents, and applied them from time to time in liquidation of the debt. When it was satisfied, the debtor might, as before observed, re-enter and maintain ejectment; and it is said to have been called *vivum vadium* because neither debt nor estate was lost.

Analogy
between an-
cient common
law mort-
gages and
Welsh mort-
gage

This mode of security was probably never general; it is ill adapted to the purpose of a security, the object of which is the repayment of the loan in one entire sum at a given time, and not a repayment by small instalments, which in fact is eating out the debt piecemeal; and it seems now to have entirely ceased. A security in land, bearing a remote resemblance to the *vivum vadium*, may be considered as subsisting under the appellation of Welsh mortgage; but there is this distinction between the securities, viz, that in the *vivum vadium* the rents were applied in satisfaction of the principal, and in Welsh mortgages they are received in satisfaction of the interest, while the principal remains undiminished. In one respect they agree—the estate is never forfeited. The Welsh mortgage seems in fact more closely to resemble the ancient *mortuum vadium* (b).

Original form
of *mortuum*
vadium

ii.—*Mortuum vadium*.—The *mortuum vadium*, or mortgage, is mentioned by Littleton, Coke, and others, as so called because on breach of condition the estate was rendered indefeasible in the mortgagee, and absolutely lost to the mortgagor. In this light it is placed by Lord Coke, in contradistinction to the *vivum vadium*, and such seems to be the opinion generally adopted. But Glanville gives a different meaning to the origin of the term. He says, "*Mortuum vadium dicitur illud cuius fructus vel redditus interim percepti in nullo se acquerant;*" and applies it to the before-mentioned species of usury at common law, viz, a feoffment to the creditor and his heirs, to be held by him until his debtor paid him a given sum, and until which he received the rents without account, so that the estate was unprofitable or dead to the mortgagor in the meantime; and the exposition given by Glanville seems the more sound, as it was rendered at a very early period of our history, while as yet the fetters on alienation were unremoved. We may there-

(b) See *post*, p. 26

fore consider the *vivum vadium* to have implied a security, by which the rents of land were from time to time applied in reduction of the principal of the debt; and the *mortuum vadium* to have originally implied a security, by which, until payment of a given sum, the rents of land were *ad interim* lost to the owner, and received by the creditor and unaccounted for, so that the debt remained undiminished, which was at common law, as before remarked, in the event of the creditor dying possessed of the pledge, punishable as usury, and it must be observed, there was the like advantage, in one respect, to the debtor in this form of mortgage, as in the *vivum vadium*, viz, that the estate was never lost

There is no trace of the period when this mode of mortgage fell into disuse. In its stead arose the *mortuum vadium*, or mortgage, afterwards so well known at common law, and thus described by Littleton (c) "Item; if a feoffment be made upon such condition, that if the feoffor pay to the feoffee at a certain day, &c, forty pounds of money, that then the feoffor may re-enter, &c. In this case the feoffee is called tenant in mortgage, which is as much as to say in French, *come mortgage*, and in Latin, *mortuum vadium*. And it seemeth that the cause why it is called mortgage is, for that it is doubtful whether the feoffor will pay, at the day limited, such sum or not; and if he doth not pay, then the land, which is put in pledge upon condition for the payment of the money, is taken from him for ever, and so dead to him upon condition, &c, and if he doth pay the money, then the pledge is dead as to the tenant, &c."

Modern form
of *mortuum*
vadium.

It is somewhat singular that Littleton should not refer to the explanation of the term as rendered by Glanville; and we may conclude that the original *mortuum vadium* had by this time totally fallen into disuse and become obsolete. The mortgage described by Littleton was strictly an estate upon condition, that is, a feoffment of the land was made to the creditor, with a condition in the deed of feoffment, or in a deed of defeasance executed *at the same time* (for the common law does not allow a feoffment to be defeasanced by matter subsequent), by which it was provided, that on payment by the mortgagor or feoffor of a given sum at a time and place certain, it should be lawful for him to re-enter. Immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, and in him

Estate on con-
dition

CHAPTER I

the legal estate instantly vested, subject to the condition (*d*) If the condition was performed, the feoffor re-entered and was in of his old estate, paramount to all the charges and incumbrances of the feoffee, whether in the *Per* or in the *Post* (*e*), or in other words, above all persons, whether claiming through the feoffee, as heir, widow, or purchaser, or paramount, or collaterally, to the feoffee, as the lord by escheat and the husband by curtesy If the condition was broken, the feoffee's estate was absolute and his estate was indefeasible, and all the legal consequences followed as though he had been absolute owner from the time of the feoffment But until breach of condition, possession was not in general given, which was a further distinction between this mode of mortgage and the *vivum vadium* and old *mortuum vadium* In order to protect the mortgagor from the eviction of the mortgagee, to which he was become liable, a proviso was inserted, declaring that, until breach of condition, the mortgagor might hold the estate; and on the other hand, the mortgagor engaged that in such event he would do all lawful acts for further assurance

Enforcement
of conditions
at common
law.

Although the common law did not favour conditions, but required strict performance of them (*f*), yet it was in certain cases satisfied with the performance of the intent of the condition (*g*), though not performed in words; and although a difference was taken (*h*) between conditions to preserve and conditions to destroy an estate, the former being allowed to be performed as near the condition as could be, and the latter being *strictissimi juris*, yet conditions in mortgages, the performance of which, in fact, destroyed the estate of the mortgagee, were favoured in the eye of the law, and rather considered as belonging to the class of conditions for preserving estates

Forfeiture on
default of
mortgagor

Thus mortgages stood at common law, and it is difficult to conceive, if the Courts of law had been so inclined (which it does not seem they were), on what principle they could have proceeded in giving the debtor relief The forfeiture was complete, the mortgagee, by the default of the mortgagor, had

(*d*) In 5 Bac Abr, Mortgage, it is stated that "the mortgagor before forfeiture, and whilst it remains uncertain whether he will perform the condition at the time limited or not, hath the legal estate in him" This is a mistake, the legal estate instantly

vests in the mortgagee, subject to be defeated on performance of the condition by the mortgagor

(*e*) Co Int 239, a.

(*f*) *Ibid* 205, a

(*g*) Shep Touchst. by Prest 139, 143.

(*h*) Co Int 206, a

become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled land-marks of property (1).

A jurisdiction was, however, arising, under which the harshness of the common law might be softened without an actual interference with its principles, and a system established at once consistent with the security of the creditor, and a due regard for the interests of the debtor

It may under this head be lastly remarked, that at the present day, if the condition, instead of determining the estate of the mortgagee, be, that on payment, &c, the feoffee, &c. shall reconvey or re-assign the estate, there, notwithstanding the performance of the condition by payment within the appointed time, an actual reconveyance or re-assignment will be necessary

(1) Notwithstanding the rigour with which the common law punished the breach of the condition, yet it is clear from the concurrent testimony of all our old dramatic writers, the chroniclers of their times, that the law was opposed to the better feelings of the people, and that a considerable degree of obloquy attended those who took advantage of it Thus in Beaumont and Fletcher

Alathe —Thou hast undone a faithful gentleman,
By taking forfeit of his land

Algrype —I do confess I will henceforth practise repentance
I will restore *all mortgages*, forswear abominable usury
The Night Walker, or Little Thief

Equitable
jurisdiction

Reconveyance
necessary of
mortgage in
ordinary
form

CHAPTER II.

OF THE NATURE AND INCIDENTS OF A MORTGAGE SECURITY.

Term "mort-
gage" de-
fined.

i.—Definition of Mortgage—A mortgage, in the modern accep-
tation of the term in this country, is a security created by
contract for the payment of a debt already due or to become
due, or of a present or future advance, effected by means of an
actual or executory conveyance of real or personal property,
charging the mortgaged property with the payment of the
money secured, redeemable at law only according to the strict
legal conditions of the conveyance, but redeemable in equity
independently of such conditions, and enforceable, in default
of payment, by foreclosure or sale in lieu thereof (*a*)

A charge on real or personal property may arise by operation
of law, or may be effected by contract. In the present Treatise
it is proposed to discuss only charges by contract.

Charges by contract to secure a debt or loan may be effected
by means of mortgage, pledge, or hypothecation.

Charges by
operation of
law distin-
guished from
mortgages

According to the above definition, a mortgage arises out of
contract between a debtor and a creditor for the payment of
a debt or loan; and herein it is distinguished from a charge
arising by operation of law, either under a judgment or charg-
ing order made by a Court of competent jurisdiction, or by
way of lien as incident to contracts in which the parties stand
in a relation to each other other than that of debtor and
creditor by virtue of the mortgage contract itself, as, *e g*, vendor
and purchaser, solicitor and client, and factor and principal.

Charges
under settle-
ments and
wills

The definition excludes charges created by deed of settlement,
or by testamentary disposition, as in the case of a jointure or
portion secured by a term and also charges of debts or legacies
created by will or codicil. Such charges give no right of fore-
closure (*b*).

(*a*) In Ireland, and in many of the
Colonies, mortgages are generally en-
forceable by sale instead of foreclosure,
and the English Courts have power in a
foreclosure action to decree a sale. See

post, p 725

(*b*) See *Sampson v Patterson*, 1 Ha
533, 535, *Jenkin v Row*, 5 De G &
S. 107, *Re Owen*, (1894) 3 Ch 220.

Mortgages are also distinguished by the above definition from powers of distress or entry given to secure the performance or observance of obligations other than the repayment of a debt or loan, such as the execution of works, or the payment of rents, or the keeping of conditions and covenants in leases, &c

CHAPTER II
Securities for performance and observance of obligations

The term "mortgage" has frequently been defined as a pledge (c), and it is apparently derived from the Latin words "*mortuum vadum*," or dead pledge. But, even as regards real estate, and such personalty as is capable of complete transfer without actual or constructive delivery, it seems necessary, to the completeness of the definition, to indicate that the so-called pledge must be made by means of a legal or equitable conveyance or assurance of the property. And, as regards personal chattels, the use of the word "pledge" seems to overlook important distinctions between a mortgage where the title passes to the mortgagee by virtue of a bill of sale, though without delivery, and a pledge (strictly so called) where a qualified property passes by actual or constructive delivery of the chattels (d)

Distinction between mortgage and pledge

The repayment of a debt or loan may be secured by hypothecation, or equitable assignment of choses in action or goods to which the debtor or borrower is entitled, but which are owing by or in the hands of third persons. Such hypothecation amounts to an appropriation of the specific fund or chattels, and may be effected either by agreement between the parties, or by an order on the holder of the fund or chattels (e). An hypothecation differs from a mortgage in that there is no actual or executory conveyance or assurance of the property appropriated for payment of the debt or loan, and from a pledge in that there is no actual or constructive delivery of the property.

Hypothecation distinguished from mortgage and pledge

ii.—Assurance of Property by Mortgage.—The transfer of property by way of mortgage is, according to English common law, to be regarded less as akin to the Roman *pignus* or *hypotheca* than as a conveyance on common law condition (f). By the civil law, the debt secured was regarded as the principal,

Difference between civil law and the common law of England as to mortgages

(c) See Co Lat 205, a, Com Dig tit Mortgage, A, Dav Conv 3rd ed vol 11 p 2. See also *Gillon v Hancock*, 2 Atk 435

(d) See further as to the distinction between mortgages and pledges, *post*,

Chap LXIII pp 1458 *et seq*

(e) See *post*, Chap LXIV pp 1487 *et seq*

(f) See Butler's note, Co Lat. 205, a

CHAPTER II

and the security was merely an incident. When the debt was discharged, the security was extinguished, and, in case of default, until sentence was pronounced giving possession to the creditor, the ownership of the debtor was not displaced (*g*). But, according to the common law of England, immediately upon the execution of a mortgage, the property vests in the mortgagee, subject to a condition for redemption and defeasance on payment of principal and interest on a specified day (*h*). If the money is paid on that day, the condition is performed, and the mortgagor is entitled, like any other grantor of an estate conditioned upon his performance thereof, to re-enter and hold the property as of his former estate. If, however, the money is not paid on the very day, then, at law, the property becomes vested in the mortgagee absolutely, and discharged from the condition. The strictness of the legal conception of a mortgage has been, as will be seen hereafter (*i*), materially modified by the doctrine of redemption introduced by the Court of Chancery.

Legal and
equitable
mortgage

A mortgage may be effected by means of a legal or an equitable assurance. By a legal mortgage, the legal estate in the property is conveyed to the mortgagee, subject to the mortgagor's right to redeem at law, on the day specified, and, in equity, at any time until foreclosure or sale. An equitable mortgage does not pass the legal estate to the creditor, but operates by way of equitable or executory assignment or transfer. Such charges are usually effected either by mortgages in the ordinary form of property already in mortgage, or by instruments charging without expressly purporting to convey property, or by express or implied agreements to give a legal mortgage.

Equitable
charge

As will be seen hereafter, an instrument charging without expressly conveying property may give to the creditor a right to call for a legal mortgage (*k*).

Agreement
to give legal
mortgage
enforceable
in equity

Equity will specifically enforce the performance of an agreement to give a legal mortgage as a security for a subsisting debt or an actual advance, and until such mortgage is given, will treat the agreement as an executory assurance, equivalent to an actual assurance so far as the equitable rights and remedies of the parties are concerned (*l*).

(*g*) Bac Abr tit *Mortgage*, A.

(*h*) In modern times a proviso for reconveyance has been substituted for the old condition of defeasance. See

post, p 128

(*i*) See *post*, p 11

(*k*) *Post*, pp 48 *et seq.*

(*l*) *Post*, p 48.

The agreement for an assurance by way of mortgage may be in express terms, evidenced by deed or other writing; or it may be raised by implication, as in the case of an equitable mortgage by mere deposit of deeds without any agreement in writing (*m*).

CHAPTER II

Agreement
for mortgage
implied

It may be laid down as a general proposition, with few exceptions, that every species of property, real or personal, corporeal or incorporeal, moveable or immoveable, in possession, remainder, expectancy, or even in action, may be the subject of mortgage. Manors, lands and tenements, freehold, copyhold, and leasehold; remainders or reversions, rents, franchises, advowsons, rectories impropriate, tithes, bills of lading, ships, freightage, articles of merchandise, bills of exchange, debts, government annuities, title deeds, and even possibilities, may, according to their several natures, be conveyed, transferred, delivered, or assigned, by way of mortgage security.

What pro-
perty may be
mortgaged

iii.—Mortgage creates a Charge on the Mortgaged Property — The effect of a mortgage is to charge the moneys secured upon the mortgaged property and to make it answerable for the repayment of such moneys

It is, indeed, usual to insert in mortgage deeds covenants by the mortgagor to repay the principal sum secured on a specified day, and to pay interest thereon in the meanwhile, and also thereafter, until the principal is repaid. The effect of these covenants is to create a personal contract between the mortgagor and mortgagee for payment of the money, and to render the mortgagee to whom they are given a specialty creditor, but such covenants are not a necessary part of the mortgage security. Notwithstanding a judicial dictum to the contrary (*n*), it is clear that a mortgage does not of itself imply a debt by specialty.

Covenant for
personal pay-
ment

A mortgage, if secured by covenant or bond (*o*), is a debt of specialty, although the money so secured be not actually paid to the mortgagor, but consist of a sum which the mortgagor has previously covenanted to pay to the mortgagees as trustees of a voluntary settlement, and which sum such trustees have agreed to lend him on that security (*p*).

Mortgage
debt, when
a specialty,

(*m*) *Carter v Wake*, 4 Ch. D 606
And see *post*, Chap VII pp 54 *et seq.*

(*n*) See *Galton v. Hancock*, 2 Atk.
435.

(*o*) Bonds were formerly often taken
as a collateral security for the repay-
ment of mortgage moneys, but the
practice has become obsolete

(*p*) *Tanner v Byrne*, 1 Sim. 160.

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—when
simple con-
tract.

If a mortgage does not contain any covenant for payment, nor is accompanied by a collateral bond, the debt is a simple contract debt. In such a case, the fact of the advance being made at the request of the mortgagor, raises a contract by parol, which is not merged in the mortgage as a security of a higher nature, and the mortgage will be considered as a collateral security, and therefore, before the Judicature Act, an action of debt or of assumpsit lay (*q*). So in equity, "Every mortgage implies a loan; every loan a debt; and though there were no covenant or bond, the personal estate of the borrower must remain liable to pay off the mortgage" (*r*).

When a cove-
nant for per-
sonal payment
will be im-
plied

Admission of
debt

A provision in a mortgage deed, that the money is to be repaid on a certain day, imports a covenant for repayment on that day (*s*).

If a debtor for a collateral purpose executes a deed by which he admits the debt, even though he conveys property to a trustee upon trust to sell and pay the debt out of the proceeds, that will not raise an implied covenant to pay, where the acknowledgment appears to have been made solely for a collateral purpose; though, as a general rule, such a covenant will be implied from an unequivocal acknowledgment in a deed of such a liability (*t*).

Recital of
debt

A deed reciting a simple contract debt, and agreeing to execute a further security with all incidental covenants, constitutes a specialty (*u*); a mere recital of a debt will not be sufficient (*x*).

No covenant
in Welsh
mortgages,
&c.

A covenant for payment is not usually inserted in a Welsh mortgage, nor is such a covenant inserted in a mortgage of copyholds by actual surrender, though the mortgagor is usually required to execute a collateral deed containing such a covenant, and also any other covenants necessary for maintaining the security, or otherwise incident to the terms of the contract (*y*).

(*q*) *Yates v Aston*, 3 G & D 351, *Allenby v Dalton*, 5 L J K B 312, *Hodges v Croydon Canal Co*, 3 Beav 86

(*r*) Per Lord Talbot in *King v King*, 3 P Wms 358. And see *Cope v Cope*, 2 Salk 449, *Thomas v Terry*, Glib Eq Rep 110, *Ancaster v Mayer*, 1 Bro C C 454, 464, *Quarrell v Beekford*, 1 Madd. 278

(*s*) *Hart v Eastern Union Rail Co*, 7 Exch 246, 8 Exch 116. See *Sutton v. Sutton*, 22 Ch. D. 511, 516, C A.

(*t*) *Courtney v Taylor*, 6 Man & Gr 851. See *Marryat v Marryat*, 28 Beav 224, *Isaacson v Harwood*, L R 3 Ch A 225, *Kidd v Boone*, L R 12 Eq 89. See as to the effect of such an acknowledgment on the Statute of Limitations, *post*, pp 977 *et seq*

(*u*) *Saunders v Milsome*, L R 2 Eq 573

(*x*) *Jackson v North Eastern Rail. Co*, 7 Ch D 573. See *Iven v Elwes*, 3 Drew 25

(*y*) See *Lawley v. Hooper*, 3 Atk. 278, at p 280. And see *post*, p 150

Personal liability, express or implied, is not, however, necessarily incident to a mortgage. A charge by way of mortgage upon property may be so framed as to exclude all personal liability of the mortgagor. A mortgage of a term for the purpose of raising money for portions usually imposes no personal liability upon the borrowing trustees of the term; and, though a covenant by the tenant for life to keep down the interest is usually inserted in the mortgage deed, such a covenant is collateral and merely ancillary to, but not an essential part of the mortgage security (z). The absence of a covenant for payment in no way affects the mortgagor's right of redemption (a).

CHAPTER II

Exclusion
of personal
liability for
mortgage
debt

iv.—Right of Redemption essential to Mortgage.—The right of redemption is an essential and inseparable attribute of a mortgage security. It has been already said, that, by the civil law, the debtor might redeem the estate on payment of his debt at any time before sentence passed. It is evident how opposed to this is the doctrine of forfeiture at common law. The absolute forfeiture of the estate, whatever might be its value, on breach of the condition, was, in the eye of equity, an injustice and hardship, although perfectly accordant with the system on which the mortgage itself was grounded. The Courts of Equity, founded on the principles of the civil law, gradually succeeded, by an introduction of those principles, in moderating the severity with which the common law followed the breach of the condition.

Principles of
civil law
followed in
equity

Though they could not alter the legal effect of the forfeiture at common law, they operated on the conscience of the mortgagee, and, acting *in personam* and not *in rem*, they declared it unreasonable that he should retain for his own benefit what was intended as a mere security; and they adjudged that the breach of the condition was in the nature of a penalty, which ought to be relieved against, and that the mortgagor had an equity to redeem on payment of principal, interest and costs, notwithstanding the forfeiture at law.

Rule in equity
as to right of
redemption

Against the introduction of this novelty, the judges of common law strenuously opposed themselves, and though ultimately defeated by the increasing power of equity, they nevertheless in their own Courts still adhered to the rigid doctrine of forfeiture,

Conflict
between
Courts of
common law
and equity.

(z) See *Floyer v Lavington*, 1 P Wms 268, *Mellor v. Lees*, 2 Atk. 494, 496

(a) See *infra*, pp 12, 13

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and consequently the law of mortgage fell almost entirely within the jurisdiction of equity, with the result that, as the Courts of Equity became established in power, the doctrine of the equity of redemption became fully recognized (*b*)

No restrictions on right to redeem allowed

It was a necessary corollary to the establishment of this doctrine to lay down the rule that the debtor could not, even by the most solemn engagements entered into at the time of the loan, preclude himself from the right to redeem, as is expressed in the well-known maxim, "Once a mortgage always a mortgage"

Agreements fettering redemption void

It is therefore a well-established rule that equity will control even an express agreement of the parties, and will let a man loose from his agreement, and, even against his agreement, admit him to redeem a mortgage (*c*); and that whatever clause or covenant there may be in a conveyance, yet if upon the whole it appear to have been the intention of the parties that such conveyance shall only be a mortgage, or pass an estate redeemable, a Court of Equity will always construe it so, and reject any stipulation seeking to negative or fetter the right of redemption (*d*)

Restriction within limited time.

So, it was held that no condition could be valid which purported to restrict the right of redemption within a limited period, as the life of the mortgagor (*e*)

Restriction of right to redeem to particular class of persons.

Nor did the attempt better succeed to confine the right of redemption to a particular heir or class of heirs. Thus, where a mortgage deed contained a proviso for redemption by the mortgagor or the heirs male of his body, and a covenant by the mortgagor that no one but himself or the heirs of his body should be admitted to redeem, the jointress was allowed to redeem, though circumstances were adduced to explain and support the proviso and covenant (*f*).

Covenant for repayment does not affect right to redeem

It is clear, notwithstanding a dictum to the contrary in the case last referred to, that the absence of a covenant for repayment of the money, or of a collateral bond, cannot affect the right to redeem, for though these are collateral securities (as

(*b*) See *Langford v. Barnard*, Tothill, 134, temp. Eliz., *Emanuel College v. Evans*, 1 Rep. in Ch. 10, temp. Car. I

(*c*) *Howard v. Harris*, 1 Vern. 192, and see *East India Company v. Atkins*, Comyns, 349, where *arguendo* it is said, equity will relieve, even if the mortgagor take his oath not to redeem

(*d*) 5 Bac. Abr. 5, *Seton v. Slade*, 7 Ves. 265, 273

(*e*) *Newcomb v. Bonham*, 1 Vern. 7,

reversed on special grounds. See *post*, p. 19, *Kilvington v. Gardiner*, cited 1 Vern. 192. And see *Spurgeon v. Collier*, 1 Ed. 55, *Jason v. Eyns*, 2 Ch. Ca. 33, *Price v. Ferrie*, 2 Freem. 258; *Goodman v. Grierson*, 2 Ba. & Be. 278

(*f*) *Howard v. Harris*, 1 Vern. 33, 190. See *Floyer v. Lavington*, 1 P. Wms. 271, *Mellor v. Lees*, 2 Atk. 494, 496.

has been seen) creating a personal obligation on the mortgagor, yet independently of them every loan implies a debt, and the right to redeem proceeds on the principle that a creditor shall not obtain advantage by his security beyond his principal, interest and costs. The bond or covenant may tend to explain a transaction and show the intention of the parties in a doubtful case to create a mortgage, it may be good matter of evidence; but neither of them is a necessary ingredient in the creation of a mortgage, for, to apply the remedy, equity only requires to be satisfied that the conveyance was originally intended as a security for the payment of a sum of money, whatever form the security may take (*g*).

v.—Mortgage enforceable by Foreclosure.—In strictness, where there is no right of foreclosure, there is no mortgage. Where, upon a deed of grant of lands subject to a limited power of redemption, the question was, whether the deed was to be construed as a mortgage, or as a conditional sale (*h*), the rule was thus expressed by Lord Manners—"The fair criterion, by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this, are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?" (*i*).

Right of foreclosure an essential element of a mortgage

So, where an estate was conveyed to a person in trust that the same should stand charged with a principal sum and interest, with a power of sale, it was held that this was not a mortgage entitling the grantee to foreclosure (*j*). So, a trust to pay out of rents and profits is not strictly a mortgage, as there is no right of foreclosure (*k*); nor, for the same reason, is an equitable charge created by will upon a reversionary interest in land (*l*). But the Court will presume an instrument intended as a security to be an ordinary mortgage entitling the mortgagee to foreclose, unless the terms exclude such construction (*m*).

Securities not importing right of foreclosure

(*g*) See *King v King*, 3 P Wms 360, *Mellor v Lees*, 2 Atk 494, 495.

(*h*) As to the difference between conditional sales and mortgages, see *post*, p 19.

(*i*) *Goodman v Grierson*, 2 Ba & Be 274, at p 279.

(*j*) *Sampson v Pattison*, 1 Ha 533. See *Jenkin v Row*, 5 De G & Sm 107, *Schwartz v Mayhew*, 31 Beav 37.

(*k*) *Taylor v Emerson*, 4 Dr & War. 117. See *Slade v Rigg*, 3 Ha 35;

Bell v Carter, 17 Beav 11. Such incumbrances, however, have other incidents of a mortgage, as, for instance, the right of redemption. *Schwartz v Mayhew*, 31 Beav 37, *Wicks v Scrivens*, 1 J & H 215, 218, *Pearce v Morris*, L R 5 Ch A 230. And, accordingly, they are sometimes, in a popular sense, included by conveyancers under the term "mortgages."

(*l*) *Re Owen*, (1894) 3 Ch. 220.

(*m*) *Baile v Lord*, 2 Dr & War 480.

CHAPTER II

Mortgage of
uncalled
capital of
company

Principle of
the rules

In a recent case (*n*), where foreclosure was claimed in respect of a mortgage of uncalled capital of a company, the claim was allowed, although it had never previously been made in respect of property of the kind in question, apparently upon the ground that every mortgage imports a right of foreclosure, irrespective of the nature of the property comprised in the security.

That foreclosure is essential to a legal mortgage is evident, if the strict terms of the mortgage contract and the grounds on which equity interferes to mitigate the strictness of that contract are considered. By such a mortgage the property is conveyed to the mortgagee subject to a condition for redemption or reconveyance if the money is paid on a specified day; on default in payment, the conveyance becomes at law, and according to the strict terms of the contract, absolute, and, but for the interference of equity, would operate as a foreclosure. In order to moderate the severity and consequent hardship incident to a strict enforcement of the contract, equity has interfered to prevent it from having its full effect, and when the ground of interference is gone by the non-payment of the debt, equity simply removes the stop it has itself put on, or, in other words, decrees foreclosure (*o*). And the same principle has been applied by the Courts of Equity with respect to equitable mortgages. The result appears to be that the mortgagee is entitled to foreclosure (subject to the jurisdiction to order a sale in lieu of foreclosure (*p*)) in all cases where, but for the interference of equity, foreclosure would, in effect, have followed *ex contractu*, so that foreclosure is a necessary incident of every transaction which the Court treats as a mortgage (*q*).

Mortgagee
entitled only
to principal,
interest, and
costs

vi.—Collateral Advantage cannot be obtained—It is a well-established rule in equity that a mortgagee will not be allowed, as such, to avail himself of the necessities of his debtor so as to obtain a collateral or additional advantage beyond the payment of principal, interest, and costs. The principle underlying the decisions is that a creditor shall not be allowed to have interest for his money and an advantage besides for the loan of it, so as to “clog the redemption.” The rule, as stated by Lord Hardwicke, is that, if any fetter is laid upon redeeming the mort-

(*n*) *Sadler v Worley*, (1894) 2 Ch 170

(*o*) See *per* Jessel, M R., in *Carter v Wake*, 4 Ch D at p 606

(*p*) This jurisdiction will be considered later. See *post*, Chap. XLIX,

p 1016

(*q*) The exception in the case of a Welsh mortgage, which depends on the different nature of the contract, will be considered hereafter. See *post*, p 27

gaged estate by some original agreement, either in the mortgage deed or a separate deed, it will not avail, where it is done with a design to wrest the estate out of the hands of the mortgagor (*1*)

Accordingly, equity will not allow the mortgagee to enter into a contract with the mortgagor, *at the time of the loan*, for the absolute purchase of the lands for a specific sum, in case of default made in payment of the mortgage-money at the appointed time, justly considering that it would throw open a wide door to oppression, and enable the creditor to drive an inequitable and hard bargain with the debtor, who is rarely prepared to discharge his debt at the specific time (*2*)

Agreement in mortgage for purchase of equity of redemption

Thus, where 16,000*l* was lent on mortgage, and, by a separate deed, the mortgagor covenanted that he would, on being required so to do, convey to the mortgagee ground rents of the value of 16,000*l*, being part of the mortgaged estate, at twenty years' purchase; on a bill for redemption, the mortgagee insisted on the agreement, but redemption was decreed on payment of principal, interest, and costs, without regard to the covenant, which was set aside as unconscionable (*3*).

Agreement for absolute conveyance of ground rents.

So, where an insurance society advanced a sum of 10,000*l* on a reversionary interest of the mortgagor contingent on his surviving his father, and by a separate instrument the mortgagor agreed that a policy of life assurance which was effected as part of the loan transaction should in certain events belong absolutely to the trustees of the society, it was held that, in accordance with the equitable doctrine against fettering the right of redemption, the mortgagor was, notwithstanding the agreement, entitled to the policy moneys after payment of the moneys secured by the mortgage (*4*).

Agreement that policy effected on loan shall be property of mortgagee

But care must be taken to distinguish between the last-mentioned rule and a case with which it may be confounded, viz, an agreement by the mortgagor, in case of sale, to give the mortgagee a preference of pre-emption, which, if claimed within a reasonable time, will be enforced (*5*). And although at first view this may seem to be within the objection raised by equity, viz, that of giving the creditor a collateral advan-

Right of pre-emption.

(*1*) *Mellor v Lees*, 2 Atk 494, 495

(*2*) *Price v Perrie*, 2 Freem 258, *Willett v Winnell*, 1 Vern 488, *Bowen v Edwards*, 1 Rep in Ch 221, *Re Edwards*, 11 Ir Ch R 367

(*3*) *Jennings v. Ward*, 2 Vern 520.

(*4*) *Salt v Marquess of Northampton*, (1892) A C 1 See *post*, p 292

(*5*) *Orby v Trigg*, 9 Mod 2, *Re Edwards*, 11 Ir Ch. R 367 See *Dawson v Dawson*, 8 Sim 346, *Cookson v Cookson*, 8 Sim 529

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tage over and above his principal and interest, yet on closer inspection it will be found clear of the rule. The option of sale is still left with the mortgagor; he may redeem or sell, nor is he tied down to price; all that is stipulated for is, that if he thinks fit to sell, he shall give the mortgagee the refusal (*y*). Rights of pre-emption, however, are construed strictly (*z*).

Whether limit
of time for
repayment
makes any
difference

Some writers (*a*) have also considered the general rule, that the mortgagee shall not be allowed to enter into a contract with the mortgagor, at the time of the loan, for the absolute purchase of the land for a specific sum in case of default in payment of the mortgage-money at the appointed time, not to apply in case the payment of the money advanced and interest be limited to a particular period; and for this doctrine the case of *Tasburgh v Echlin* (*b*) is advanced as an authority. But this case was determined on circumstances so special that it is scarcely an authority for any subsequent case, and is hardly applicable to the matter in question (*c*).

Subsequent
agreement for
purchase of
equity of
redemption
valid

The rule will not be extended so as to forbid agreement for the purchase of the equity of redemption, entered into *bonâ fide* and subsequently to a mortgage which was made and concluded without reference to any such agreement, though followed by a subsequent agreement between the parties, that the mortgagor might have the estate on payment of principal, interest, and costs (*d*), nor will the rule apply to the case of a release of the equity of redemption, with a collateral agreement to reconvey on repayment of the purchase-money (*e*).

Abandonment
of agreement

An agreement for the release of the equity of redemption to the mortgagee not acted on for many years was, under the circumstances, treated as abandoned (*f*). And in one case, where the mortgagee took a conveyance of the equity of redemption, but allowed the mortgagor to continue in possession for a considerable period, it was held that the mortgagor might redeem (*g*).

Inadequacy

Mere inadequacy of price is no ground for setting aside a

(*y*) *Bowen v Edwards*, 1 Rep in Ch 221

(*z*) See cases cited *supra*, p 15, n (*x*), and *Re Edwards*, 11 Ir Eq R 367

(*a*) 1 Pow Mortgage, 7th ed 626

(*b*) 2 Bro P C 265

(*c*) But see Pow Mortgage, 4th ed 183

(*d*) *Cottenell v Purchase*, Ca t Talb (Williams) 61 See *Waters v Groom*, 11 Cl & F 684

(*e*) *Ensforth v Griffith*, 15 Vin Ab 468, pl 8, *Gossip v Wright*, 9 Jur N S 592, *Lincoln v Wright*, 4 De G & J 16 See also *Perry v Maistone*, 2 Bro C C 397, *Barrell v Sabine*, 1 Vern 268

(*f*) *Ruabrook v Lawrence*, L R 5 Ch A 3

(*g*) *Harris v Horwell*, Galb Eq Rep 11

purchase of the equity of redemption made by the mortgagee in consideration of the mortgage debt, since where no money is advanced at the time of the agreement, no advantage could be taken of the debtor's distress (*h*). So where the transaction was fair, though the full value was not given, the agreement was enforced (*i*)

CHAPTER II
of price
immaterial

It may be here incidentally remarked that, if the executor of a mortgagee of a term of years purchases the equity of redemption in fee for a small sum in his own name and for his own benefit, he will be considered a trustee for the benefit of his testator's estate (*l*)

Executor of
mortgagee of
term pur-
chasing fee

A sale or release to a mortgagee of the equity of redemption will be supported, unless there is fraud or pressure (*l*) The onus of proving fraud or misrepresentation rests on the party seeking to impeach the deed (*m*) The right to set the release aside may be purchased from the mortgagor or his assignee (*n*)

Effect of
fraud

Upon the principle that a mortgagee shall not be allowed any advantage collateral to his mortgage, equity will not permit a mortgagee to accept a lease from the mortgagor by which he would obtain a benefit beyond the payment of principal, interest, and costs, to which he is entitled by virtue of his mortgage

Lease by
mortgagor to
mortgagee

Where there are circumstances of oppression and fraud, such a lease would, of course, be set aside (*n*); and it would seem that such a lease for a long term of years (as 999 years), at a rent no higher than would be reserved on a common occupation lease if the rent were a fair rent, would be set aside even without circumstances of oppression or fraud, on the principle that the parties were not on equal terms, and that such a lease was in effect a departing with the inheritance (*o*); in fact, any lease from a mortgagor to a mortgagee will be looked at with suspicion, especially if the latter obtains any advantage beyond his interest (*p*). A lease, however, for twenty-one years, at a fair occupation rent, was supported (*q*); and a lease will not be

(*h*) *Purdie v Millet*, Taml 28

(*i*) *Chambers v Waters*, 11 Cl & F 684

(*k*) *Fosbrooke v Balguy*, 1 My & K 226

(*l*) *Ford v Olden*, L R 3 Eq 461 See *Knight v Majoribanks*, 2 Mac & G 10; *Purdie v Millet*, Taml 28 And see *Massey v Johnson*, 1 Exch 241, *Barton v Bank of New South Wales*, 15 App

Cas 379, P C

(*m*) *Melbourne Banking Co, Limited v Brougham*, 7 App Cas 307.

(*n*) *Gubbins v. Creed*, 2 Sch & L 214

(*o*) *Webb v Ronke*, 2 Sch & L 661

(*p*) *Hickes v Cooke*, 4 Dow 24, 25

(*q*) *Morony v O'Dea*, 1 Ba & Be 109

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set aside because the value has changed in the lapse of years (*g*) Where a mortgagee took a lease from the mortgagor subsequent to a *pursne* mortgage, he was treated as mortgagee in possession, but no objection was raised to the lease (*h*) Leases in nature of a Welsh mortgage stand on a different footing (*s*)

Restrictions
on mortgagee
to prevent
clogging
equity of
redemption.

The Courts, fearful of opening a door to fraud and usury, have imposed numerous other restrictions on the mortgagee so as to prevent him from clogging the equity of redemption, as, for instance, that he shall not be permitted, as a general rule, to make any charge by way of bonus or commission in consideration of the advance (*t*); nor to stipulate for interest at an increased rate on default (*u*), or for compound interest (*x*); nor to make any charge for his personal trouble (*y*); nor appoint himself the receiver, even under an express agreement for that purpose with the mortgagor (*z*); for he is entitled to no benefit beyond his principal, interest, and costs, besides that such an agreement might subject the mortgagor to imposition, and, under the old law, have tended to usury.

So, also, until the recent Act (*a*), a solicitor-mortgagee was not generally allowed to charge profit costs (*b*)

Exception to
general rules
of equity in
cases of family
arrange-
ments.

The preceding authorities show with what jealousy equity has looked on every attempt made to counteract or oppose its interference in behalf of the mortgagor; but its object being to protect him at a time when his necessities may have placed him at the mercy of the mortgagee, *cessante causa cessat etiam lex*, and therefore the general rules of equity before stated will admit of a very considerable exception in cases in which there is evidence of intention in the nature of the transaction, that provision was intended to be made by the mortgagor for some branch of his family, or that the mortgage was intended by him in the nature of a family settlement Thus, where the right to redeem was confined to the mortgagor during his life only, but there was an express covenant that the mortgagor might redeem at any time during his life, so that the mortgagee could not have compelled the mortgagor to redeem, and it was proved that the mortgagor had a kindness for the mort-

(*g*) *Hickes v Cooke*, 4 Dow 24, 25
(*h*) *Gregg v Arnott*, 11 L & G t Sug
246.
(*s*) See *post*, p 28
(*t*) See *post*, p 1145
(*u*) See *post*, p 129

(*x*) See *post*, pp 131 *et seq*
(*y*) See *post*, p 1203
(*z*) See *post*, p 1192
(*a*) 58 & 59 Vict c 25
(*b*) See *post*, p 1194

gatee, his near relative, and intended him to have the land, and that the restriction of redemption was inserted only for a particular reason, it was held by Lord Keeper North (*c*), reversing the decision of Lord Nottingham, C (*d*), that redemption after the death of the mortgagor must be refused. The like doctrine governed a case (*e*) in which a man, by settlement on his marriage, reserved to himself the option of paying a sum of money, or letting the settlement stand (*f*). In *Jason v. Eyre* (*g*) redemption was decreed, although it might have been fairly regarded as coming within the same exception, on the ground of the transaction being intended by way of settlement or family provision. In this case *parol* evidence was offered and read on both sides, which the Court took no notice of, but rejected. It will be observed that, in *Newcomb v Bonham* (*h*), the ultimate decision was expressly founded on *parol* evidence of the mortgagor's intention, and at the present day such evidence would be clearly admissible (*i*).

vii.—Distinction between Defeasible or Conditional Purchase and Mortgage—With reference to the rule already considered (*h*), that a mortgagee will not be allowed to obtain for himself an advantage collateral to his security, mortgages must be distinguished from contracts for purchase, subject to a right for the vendor to repurchase within a limited time, or subject to a condition avoiding the conveyance if the vendor pays a specified sum at a fixed date. In such instances the vendors will be strictly kept to their contracts, which are regarded as defeasible or conditional purchases, creating only a right of repurchase in accordance with the condition, and not as imposing such a right of redemption as in the case of a mortgage (*i*).

What are
defeasible
purchases

So, where a certain sum had been lent without security, and an agreement was entered into that if the money so lent, together with certain further advances, were not repaid by a specified day, the lease of a farm should be assigned to the lender without any further consideration; it was held that the relation of

Agreement
for lease on
default of
repayment of
loan

(*c*) *Bonham v Newcomb*, 1 Vern 231

(*d*) *Newcomb v Bonham*, 1 Vern 7

(*e*) *King v Bromley*, 2 Eq Ca Abr 595

(*f*) And see *Wolston v Aston*, Hard 511, *Hampton v Spencer*, 2 Vern. 288

(*g*) 2 Ch Ca 33

(*h*) 1 Vern 7

(*i*) *Richards v Syme*, 2 Eq Ca Abr 617

See *infra*, p 23

(*k*) *Ante*, p 14

(*l*) *Bunning v Bunning*, 1 L J Ch 56

CHAPTER II

Absolute conveyance with subsequent agreement for repurchase

Agreement for conveyance to third person defeasible on payment by purchaser

Conditions strictly enforced.

Time for repurchase of essence of contract

Exception where amount not settled

Transaction must be purchase or mortgage as regards both parties.

vendor and purchaser, and not that of mortgagor and mortgagee, was constituted by the agreement (*m*)

So, also, where an equity of redemption was absolutely conveyed, and subsequently it was agreed between the parties that, if the vendor should desire it, he might have the estate back on payment of the purchase-money with interest and costs, the transaction was held to be a sale and not a mortgage (*n*)

Where the purchase-money of an estate was paid by a third person on behalf of the purchaser, and a further sum also advanced, and it was agreed that the estate should be conveyed to such third person, and that, if the purchaser repaid the sums with interest by a future day, then the agreement was to be void, and if not, then the sale was thereby confirmed absolutely to the other party; it was held that the agreement constituted a conditional purchase (*o*)

The right of repurchase is a privilege, and is only to be exercised upon a strict performance of the terms (*p*), unless the terms are waived (*q*); otherwise the grantee's estate will become absolute (*r*)

In *Davis v Thomas* (*s*), the mortgagor released to the mortgagee his equity of redemption, and the mortgagee granted him a lease for ninety-nine years determinable on lives at a rent, with a proviso that, if he paid the rent regularly, he might redeem within five years, and in default the agreement was to be void; it was held that the privilege of redemption was lost on non-payment of the rent at the periods fixed for that purpose

But, where a time is fixed for the repurchase, and the terms depend on the result of an account which has not been rendered by the other party, a reconveyance will be decreed (*t*).

It is not always easy to discriminate between a mortgage and a purchase qualified by a power to repurchase (*u*) In determining questions of this nature, it must be borne in mind that

(*m*) *Tuppley v Sheather*, 8 Jur N S 1163

(*n*) *Cottrell v Purchase*, Cas t Talb (Williams) 61 See *Neal v Morris*, Best, 597, *Brooke v Garrod*, 2 De G & J 62, *Ward v Wolverhampton Waterworks Co*, L R 13 Eq 243

(*o*) *Perry v Meddowcroft*, 4 Beav. 197, affirmed, 10 Beav 141

(*p*) *Gossip v Wright*, 9 Jur N S 592, *Joy v Birch*, 4 Cl & F 68

(*q*) *Pegg v Wisden*, 16 Beav 239.

(*r*) *Floyer v Lavington*, 1 P Wms 268, *Mellor v Lees*, 2 Atk 494

(*s*) 1 R & My 506 And see *Joy v Birch*, 10 Bl N S 241, *Williams v Owen*, 5 My & Cr 303, *St John v Waseham*, cited 3 Swanst 631

(*t*) *Ponsford v Hankey*, 9 W R 353

(*u*) *Sever v Greenway*, 19 Ves 413, *Fee v Cobine*, 11 Ir Eq Rep 406, *Waters v Mynn*, 14 Jur 341, *Murphy v Taylor*, 1 Ir Ch 92, *Ogden v Battians*, 1 Jur N S 791.

a mortgage cannot be a mortgage on one side only; it must be mutual (x), that is, if it be a mortgage with one party, it must be a mortgage with both. But the rule only requires that it shall not be competent to one party alone to consider it a mortgage. In other respects the rights of the parties may be different, for it happens not unfrequently, that one party may not be able to foreclose at a time when the other may redeem (y).

So, in *Williams v. Owen* (z), it was held that if the parties intended an absolute sale, a contemporaneous agreement for a repurchase not acted upon will not of itself entitle the vendor to redeem. The Lord Chancellor seemed to attach some weight to *Goodman v. Grierson* (a), in which Lord Mannors held, that the fair criterion to ascertain whether a transaction be a mortgage or not is, whether the remedies are mutual and reciprocal (b).

Agreement for repurchase not acted on

The rule is that *prima facie* an absolute conveyance, containing nothing to show the relation of debtor and creditor, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every case the question is what, upon a fair construction, is the meaning of the instruments (c), and the absolute conveyance will be turned into a mortgage if the real intention was that the estate should be held as a security for the money (d). The deed may be absolute in form but still a mortgage (e), and the absence of a proviso for redemption will not prevent its being a mortgage (f).

The payment of interest will be evidence that the transaction was intended to be a mortgage (g).

Payment of interest

The fact that the purchase-money is not near the value of the property may be taken into consideration as tending to show that the transaction was a mortgage (h).

Undervalue, &c

The payment by the grantor of the expenses of the conveyance will raise a *prima facie*, but not a conclusive, presumption upon this question (i).

Payment of expenses by grantor

(x) *Howard v. Harris*, 1 Vern 192. See *Coplestone v. Boxwell*, 1 Ch Ca 1, *White v. Ever*, 2 Vent 340, *Stokes v. Verner*, 3 Swanst 634, *Goodman v. Grierson*, 2 Ba & Be 274. As to Welsh mortgages, see *post*, p 27.

(y) See *Talbot v. Baddley*, 1 Vern 395. (z) 5 My & Cr 306. See *Barrell v. Sabine*, 1 Vern 268, *Waters v. Mynn*, 14 Jur 341.

(a) 2 Ba & Be 274.

(b) *Goodman v. Grierson*, 2 Ba & Be 274, cited in *Williams v. Owen*, 5 My & Cr 306.

(c) *Alderson v. White*, 2 De G & J 97, 105, *Shaw v. Jeffry*, 13 Moo P C 432.

(d) *Douglas v. Culwell*, 4 De G F & J 20.

(e) *Barnhart v. Greenshields*, 9 Moo P C 18, *Holmes v. Mathews*, 9 Moo P C 413.

(f) *Bell v. Carter*, 17 Beav 11.

(g) *Allenby v. Dalton*, 5 L J K B 312.

(h) *Thornborough v. Baker*, 3 Swanst 628, 631.

(i) *Alderson v. White*, 2 De G & J. 97. See *Langton v. Horton*, 5 Beav 9.

CHAPTER II

Notice of
intention to
repurchase

A similar inference will be raised where the conveyance stipulates that the grantor shall give notice of any intention to repurchase on repayment of the purchase-money and interest due, together with an additional half-year's interest, so as to allow ample time for re-investment (*k*)

Conditional
settlement

Similarly, a conditional settlement has been held to be a security for money; as a settlement that, upon payment of a sum of money in a certain event, the prior limitation should cease and the lands go to the heirs and assigns of the settlor; upon the happening of the event, it was held only to be a security for the money, and to be redeemable after the time limited, and that not merely by the heir or executor, but also by a creditor (*l*)

Absolute
conveyance
fraudulently
obtained

An absolute conveyance, obtained under circumstances of surprise and oppression from a person intending only to borrow, was treated as a mortgage (*m*) So an absolute conveyance by a client to his solicitor of a reversionary interest was reduced to a mortgage, it not being proved that the nature of the transaction was fully explained to the client, or that full value was given (*n*).

Where an absolute interest is turned into a security and the money is to be repaid, the Court in its discretion will allow five per cent interest (*o*)

Presumption
of sale

Conversely, the fact that the grantee took possession immediately after the execution of the conveyance raises a presumption that the transaction was a sale (*p*)

No covenant
for payment

In several cases (*q*), the absence of a covenant to pay was deemed explanatory of the intention; so a trust/deed for creditors was held, by reason of its containing no such covenant, not to be a mortgage entitling the creditors to fore-closure (*r*)

Length of
possession by
grantee

Where the circumstances of a case are such as to render it certain whether the original intention of the parties was to effect a mortgage or a conditional sale, the lapse of a considerable time during which the grantee has been in possession, as

(*k*) *Lawley v Hooper*, 3 Atk 278, *Bulwer v Asley*, 1 Ph 422, *Verner v Winstanley*, 2 Sch & L 393, *Preston v Neele*, 12 Ch D 767

(*l*) *Frederick v Aynscombe*, 2 Eq Ca Abr 594, note at B, 1 Atk 392 And see *Sir Thomas Mans' case*, cited Freem Ch 206, *Earl Winchelsea v Wentworth*, 1 Vern 402, *Earl Winchelsea v Norcliffe*, 1 Vern 430

(*m*) *Douglas v Culverwell*, 4 De G F & J 20

(*n*) *Denton v Donner*, 23 Beav 285

(*o*) *Re Unsworth's Trusts*, 2 Dr & Sm 337, *Douglas v Culverwell*, *sup*, *Carter v Palmer*, 8 Cl & F 657, *Macleod v Jones*, WN (1884) p 53

(*p*) *Williams v Owen*, 5 My & Cr 303

(*q*) *Mellor v Lees*, 2 Atk 494, *Floyer v Lavington*, 1 P Wms 268 See *Davis v Thomas*, 1 R & My 506

(*r*) *Taylor v Emerson*, 4 Dr & W 117, *Holmes v Mathews*, 9 Mo P C 413

ostensible owner of the estate, will lead the Court to treat the transaction as a sale (s)

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The principles on which the Court acts in cases of conditional purchase is thus laid down by Lord Hardwicke (t).—"There is indeed a distinction in the nature of the transaction between a power of redeeming and of repurchasing, obtained by usage, which governs the sense of words. But it is well known that the Court leans extremely against contracts of this kind, where the liberty of repurchasing is made at the same time concomitant with the grant, as it must be considered in this case, being part of the same transaction; the Court going very unwillingly into that distinction, and endeavouring, if possible, to hold them to be cases of redemption. Although it is a different thing where the contract for liberty to repurchase is after a man has been for some time in possession of an estate and acting as owner under a purchase."

Principles on which Court acts in such cases stated

An important consequence results from this distinction between a mortgage and a purchase with a proviso for repurchase, viz, that in the latter case, if the party to whom the conveyance is first made dies seised, and after his death the option is declared by the other party to take the estate, the purchase-money belongs to the heir, and not, as it would if it had been a mortgage, to the executor. Thus, upon an election to repurchase, the money was decreed to the heir in preference to the executors, on the ground that it was not the case of a mortgage, but a mere collateral agreement to repurchase (u).

Devolution of purchase-money on repurchase

It may be observed that, in cases of conditional sale or settlement, there is no mutuality in point of remedy between the parties, inasmuch as though the vendor has the option of redeeming by repaying the purchase-money and interest within the specified period, the purchaser has no right to compel such repayment, and therefore there can be no foreclosure.

No mutuality of remedies in case of defeasible purchase

Equity will admit parol evidence to show that a conveyance, which is absolute in its terms, was intended by way of security only (x). A case decided by Lord Chancellor Nottingham is one of frequent reference (y). A man agreed to lend money on

Parol evidence as to nature of transaction

(s) *Tull v Owen*, 4 Y & C Ex 192, *Alderson v White*, 2 De G & J. 97

(t) In *Longuet v Scaven*, 1 Ves Sen 401, at p 404. See *Floyer v Sherard*, Amb 18

(u) *Thornborough v Baker*, 3 Swanst 628, 631

(x) *England v Codrington*, 1 Ed 169, *Yenon v Bethell*, 2 Ed 110, *Reeks v Posilethwarte*, G Coop 161, *Hodde v Healey*, 1 V & B 540, *Barton v Bank of New South Wales*, 15 App Cas 379

(y) *Sir G Maxwell v Lady Monta-*

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mortgage, and it was proposed, as was formerly practised, that the mortgagor should execute an absolute conveyance, and that there should at the same time be a deed of defeasance from the mortgagee. The mortgagor executed the conveyance, and then the mortgagee refused to execute the defeasance. Lord Nottingham (after the Statute of Frauds) admitted parol evidence to show the agreement, and decreed against the mortgagee.

So, where (a) an absolute conveyance is made for a certain sum of money, and the person to whom it is made, instead of entering and receiving the profits, demands interest for his money, and has it paid him, this will be admitted to explain the nature of the conveyance; and if the conveyance be absolute, and a suit be brought to redeem, and the defendant swear it was an absolute purchase, nevertheless parol evidence will be admissible to show the contrary (a). And an indorsement on the deed of conveyance, signed by the mortgagor only, is evidence to show the intent (b); as is also a note in writing signed by the parties (c); but in an instance where an absolute conveyance for 80*l* was made, and on bill filed to redeem, the defendant by his answer insisted that it was intended to be an absolute conveyance, without proviso and condition for redemption, but admitted that it was in trust after payment of the 80*l*. and interest for the plaintiff's wife and children, though no such trust was declared by writing; the plaintiff insisted that, as the defendant had confessed he was not to have the estate absolutely and had not proved the trust, he, the plaintiff, was entitled to redeem. The Court, however, decreed the trust for the benefit of the plaintiff's wife and children (d).

In a case where husband and wife had made an absolute conveyance of the wife's real estate by way of sale with fine, and from subsequent deeds between the same parties, an inference might have been drawn that the original deeds were

cute, Prec Ch 526. See also *Walker v Walker*, 2 Atk 99, *Young v Peachey*, 2 Atk 254, 257, *Joyes v Statham*, 3 Atk 388, *Dixon v Parker*, 2 Ves Sen 225, *Lincoln v Wright*, 4 De G & J 16, *Gordon v Selby*, 11 Bl N S 351, *Hugh v Kaye*, L R 7 Ch A 469, *Booth v Turle*, L R 16 Eq 182.
(a) *Macneil v Montacute*, Prec Ch. 526, *Card v. Jaffray*, 2 Sch & L 374,

Lord Ingham v Child, 1 Bro C C 92, *Chippys v Jee*, 4 Bro C C 471, but see *Lord Pomfret v Morris*, 2 Bro C C 218.

(a) *Franchlyn v Fern*, Barn Ch R. 30, *Whitfield v Parfitt*, 4 De G & S 240.

(b) *Franchlyn v Fern*, *sup*.

(c) *Clench v Withersley*, Finch, 376.

(d) *Hampton v. Spencer*, 2 Vern 288.

intended by way of mortgage, and there was a direct recital of the fact in one of the deeds produced from the possession of the party claiming as purchaser, still, as there was no other direct evidence, and that deed was not signed by such party, and a great lapse of time had intervened, and the witnesses were all dead, the Court refused to interfere on behalf of the heir of the wife, who claimed to redeem, alleging that the effect of the deed had been only to pass an absolute estate during the life of the husband (e)

In the case of a conveyance, which was absolute on the face of it, but of which the consideration was in fact a sum paid to the grantor's creditors, on a bill filed for a reconveyance, the grantee claimed the benefit of the securities as mortgagee; the Court held that the grantee had mixed up the character of trustee, mortgagee and agent, and decreed an account, without allowing interest on either side, and, although a small balance was found due to him, yet, on further directions, the Court refused to allow him interest on it, and decreed a reconveyance and payment of the balance then become due from him and, he having lost some of his vouchers, refused him the ~~benefit~~ of taking the account (f).

It may be remarked, that the circumstance of an agreement to reconvey, although entered into at the time of conveyance, is not sufficient to convert the transaction into a mortgage if there be evidence to rebut the presumption (g).

Upon the principle that the Statute of Frauds will not be allowed to cover fraud, parol evidence will be admissible to show that an equity of redemption reserved by the deed to one person really belongs to another, if the Court is persuaded that it is not honest for the party relying upon the statute to keep the property. So, where a wife, by a deed in form absolute, assigned to her husband a leasehold house belonging to her, which he mortgaged for payment of his own debts; the wife joined with the husband in covenanting to pay the mortgage debt, but the equity of redemption was reserved to the husband alone. Parol evidence was admitted to show that the wife had assigned the house only to enable him to mortgage it in his own name, and that it was part of the arrangement between them that he should re-assign the equity of redemption to her (h).

Parol evidence
admissible as
to fraud

(e) *Tull v Owen*, 4 Y & C Ex 192. 306, *Perry v. Meddowcroft*, 4 Beav
(f) *Price v Price*, 15 L J Ch 13 197
(g) *Barrell v Sabine*, 1 Vern 268, (h) *Re Duke of Marlborough, Davis v*
Williams v Owen, 5 My & Cr. *Whitehead*, (1894) 2 Ch 133.

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CHAPTER III

OF A WELSH MORTGAGE.

i.—Different Kinds of Welsh Mortgages—A Welsh mortgage in its original and strict form closely resembles the *mortuum vadium* described by Glanville (a), being a conveyance of an estate redeemable at any time on payment of the principal without interest · the rents and profits of the estate until such redemption being taken without account by the mortgagee in lieu of interest (b).

Another kind of Welsh mortgage, or security in the nature of a Welsh mortgage, rather resembling the ancient *vivum vadium*, is where an estate is assured to the mortgagee in fee or for a long term of years until out of the rents and profits he shall have received the amount of principal and interest

A third variation of this form of security is, where an estate is demised to the mortgagee for a short term of years, to the intent that he may take the rents and profits during the term in lieu and full satisfaction of principal and interest, with a proviso for redemption at any time during the term on payment of principal and interest then due On the expiration of the term the property will revert to the mortgagor discharged from the debt

Although a lease granted in consideration of a loan of money is impeachable, yet it has been held that a lease granted as a security for a loan at a fair rent to be retained in payment of the debt is valid, and the Court will not enter into an inquiry as to the value of the rent after long acquiescence on the part of the debtor; and such a lease is in the nature of a Welsh mortgage (c). But in the case here referred to a renewed lease, granted before the expiration of the old lease,

(a) Lib 10, cap. 6

(b) See *Talbot v Braaddy*, 1 Vern.

(c) *Morony v O'Dea*, 1 Ba & Be

at the old rent, to secure the balance then due and a further loan, and which was, on the face of it, at an undervalue, was set aside as fraudulent, and the mortgagee made to account from that time for the full value of the premises; and, as being guilty of a fraud, was refused costs

ii.—Nature and Characteristics of Welsh Mortgages—These various forms of security have certain incidents in common. The mortgagee has no power to compel redemption, nor any right to foreclosure, though the mortgagor may redeem at any time (*d*). No covenant for payment of the debt is usually inserted in the mortgage deed (*e*), and, in the absence of such a covenant, whether a contract for payment of the money is to be implied so as to enable the mortgagee to sue for the debt would seem to depend on the form of the security taken in the particular case (*f*). The presence of a covenant to pay the principal and interest on demand is not such a limitation of the time as to lead to forfeiture, and so let in foreclosure (*g*).

The position of a mortgagee, to whom an estate is conveyed until he shall have received principal and interest out of the rents and profits, was compared by Lord Hardwicke (*h*) to a tenancy by *elegit*, so that as soon as the principal and interest were satisfied the estate ceased and the mortgagor might maintain ejectment, unless the mortgagee had remained in possession twenty years (now twelve years (*i*)) after the debt was satisfied, at which time the Statute of Limitations would have begun to run, which circumstance would also bar the mortgagor of any equity of redemption (*k*). And his Lordship said that the mortgagor had the same right as the conusor under the *elegit* had, to come into a Court of Equity for an account of the rents and profits; nor would the Court relieve the mortgagee from his own contract and agreement of being subject to a perpetual account (*l*).

Relation of mortgagee to mortgagor under Welsh mortgage

In *Hartpole v Walsh* (*l*), a bill to redeem a mortgage in the nature of a Welsh mortgage was dismissed in the Irish Chancery,

(*d*) *Talbot v Braddy*, 1 Vern 394, *mins*, 2 Ir Eq R 251.
Howell v Price, Pr Ch 423 See (*h*) *Yates v Hambly*, 2 Atk 362
Longuet v Seawen, 1 Ves S 402 (*i*) 37 & 38 Vict c 57, s 7, *post*
 p 742
 (*e*) *Lawley v Hooper*, 3 Atk 280, (*k*) And see 3 & 4 Will IV c 27,
King v King, 3 P Wms 361 s 28
 (*f*) *Infra*, p 29
 (*g*) *Curtis v Holcombe*, 6 L J N S 287
 Ch 156 And see *O'Connell v Cum-*

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and on appeal to the House of Lords the judgment was affirmed; but in that particular case a second mortgage had been made to the same party, by which the mortgagor had agreed to repay the whole debt at any time after eighteen months' notice, and it was admitted that the notice had long since been given, which reduced it to the case of a common mortgage. But in a later case, Lord Lyndhurst considered the decision in the last-mentioned case to have been made on the ground of the impossibility of taking the long and complicated accounts after the lapse of ninety years, and that the redemption suit had not been prosecuted with reasonable dispatch (*m*). In that case a reversion in fee, expectant on a life estate, had been demised for a term of 500 years, with a proviso for redemption on payment of the mortgage debt, but without any definite time fixed for payment, and the mortgagor covenanted to pay the *mortgage debt on demand*, and that until payment the mortgagee might enter and enjoy the premises. Lord Lyndhurst held this to be in the nature of a Welsh mortgage, and dismissed a bill filed for foreclosure (*m*).

Time no bar
to redemption.

In a case where the transaction appeared to be in the nature of a Welsh mortgage, Lord Eldon observed that time would be no bar to redemption, unless it were proved that the party had held over for the space of twenty years (now twelve years) after the debt was fully paid and satisfied, that if it was not a case in which length of time alone would operate as a bar to redemption, the question still remained whether there were not circumstances to raise the presumption of a release from the long possession of the mortgagee. The question was submitted to a jury, who found a verdict for the mortgagor, which was sustained (*n*).

Although by s 28 of 3 & 4 Will. IV. c. 27, as subsequently noticed (*o*), the right of redemption by a mortgagor was lost at the end of twenty years (now reduced to twelve) (*p*) next after the mortgagee takes possession, unless there has been some intermediate acknowledgment of right, yet it is conceived that this enactment cannot apply to the case of Welsh mortgages (in which the original stipulation is, that the mortgagee shall hold and receive the rents until his debt is satisfied) unless twenty (now twelve) years shall have elapsed from the period when, by

(*m*) *Teulon v Curtis*, Yo 619.
(*n*) *Fenwick v. Reed*, 1 Mer 114

(*o*) See *post*, pp 740 *et seq*
(*p*) 37 & 38 Vict c 57, s 7

the receipt of the rents, the mortgage debt and interest might have been paid (*g*). CHAPTER III

In one case time was held to be no bar to redemption, although upwards of sixty years had elapsed since the mortgagee took possession (*r*).

iii.—Rights and Liabilities of Parties under Welsh Mortgages. How far the mortgagee is personally liable for payment
 —With regard to the personal liability of the mortgagor to repay the amount advanced, the effect would appear to be different according to the form of the security adopted. In the case of a Welsh mortgage proper, it is conceived that an action of debt for the principal would lie as in the case of an ordinary mortgage (*s*); though not apparently in respect of interest, the receipt of the rents and profits being, by the terms of the contract, in lieu and satisfaction of interest. In a case (*t*) of an ordinary mortgage, without any covenant to pay the debt, Lord Chancellor Talbot was of opinion that every mortgage implies a loan, and that every loan implies a debt, and that though there were no covenant or bond, yet the personal estate of the borrower remained liable to pay off the mortgage, and his lordship said that this was so in the case of Welsh mortgages, where no day certain is appointed for payment, but the matter is left at large.

Where the security is in the nature of a Welsh mortgage in the form whereby the rents and profits are to be taken by the mortgagee until all that is due to him for principal and interest is satisfied, all personal liability of the borrower appears to be necessarily excluded by the nature of the agreement between the parties.

And where it was agreed in writing that, in consideration of an advance, the borrower should let certain land to the lender for six years, the borrower to get back his lands on repayment of the advance, but there was no express agreement by the borrower to repay the money lent, it was held that there was no personal liability on the borrower to do so, and that an action of debt brought by the representatives of the lender after the expiration of the term could not be sustained (*u*).

A further point arises in respect of the mortgagee's liability Mortgagee's liability to account.

(*g*) *Fenwick v Reed*, 1 Mer. 114

(*r*) *Os de v Hemming*, 1 Vern 418

(*s*) See *ante*, p 10

(*t*) *King v King*, 3 P Wms 361

(*u*) *Cassidy v Cassidy*, 24 L R Ir

CHAPTER III

Where rents
are taken
in lieu of
interest

to account. This, again, would seem to depend upon the precise nature of the security in question

Where the mortgage is a Welsh mortgage properly so called, *i e*, where by the terms of the mortgage contract it is agreed that the mortgagee shall take the rents and profits of the land in lieu of interest until the mortgagor thinks fit to redeem, it appears unreasonable to suppose that the Court would direct an account, and by so doing relieve the mortgagor of a bargain in its terms determinable at his own instance

It is true that in some cases (*x*), where the accrual of rents and profits was equivalent to the payment of an excessive rate of interest, the Court has directed an account to be taken, and upon this it has been assumed that the Court would be willing to do so in every instance at the present day, it is to be observed, however, that the decisions referred to were all of them previous in date to the repeal of the usury laws (*y*), and it may be doubted whether they would now carry the weight attributed to them

Where rents
taken are to
be applied in
reduction of
principal

Where, however the mortgage is of a kind requiring the mortgagee to apply the rents and profits in reduction of the principal sum advanced and interest, whether it be of the fee or for a term of years, it would seem that a direction that an account be taken would be incident to an action for redemption by the mortgagor, just as in the case of an action against a mortgagee in possession under an ordinary mortgage (*z*)

Determina-
tion of mort-
gage for term

Although in the case of a Welsh mortgage of the fee or for a long term of years, the security will invariably be terminated by redemption on the part of the mortgagor, a Welsh mortgage for a short term of years may determine by effluxion of time, in which case the liability of the mortgagee to account would apparently depend upon the intention of the parties as expressed or to be inferred from the terms of the contract.

Trustees may
effect Welsh
mortgage

It has been decided in an Irish case that a trustee empowered to raise money by mortgage may effect a Welsh mortgage (*a*); such mortgages appear, however, to have been formerly very common in Ireland (*b*)

(*x*) *Fulthorpe v Foster*, 1 Vern 477
See *Alderson v White*, 2 De G & J
97, *Longuet v Scowen*, 1 Ves Sen
403, *Baile v Lord*, 2 Dr & War
480

(*y*) 17 & 18 Vict c 90

(*z*) See *Teulon v Curtis*, 10 619

(*a*) *Gorman v Byrne*, 8 Ir Com L
394

(*b*) See *Hartpole v Walsh*, 5 Bro
P C 267, at p 275

The continuing right of redemption incident to a Welsh mortgage would apparently be sufficient to prevent the power of sale given to mortgagees by sect 19, sub-sect (1) of the Conveyancing and Law of Property Act, 1881, from applying to such a security. Having regard to the fact that the definition of "mortgage" in sect. 2 of that Act includes a "charge," it would seem that such powers and provisions of the Act relating to mortgages as are not inconsistent with the nature of Welsh mortgages will be applicable thereto.

CHAPTER III

Whether
statutory
powers of sale
apply to
Welsh mort-
gages

CHAPTER IV

OF ANNUITY DEEDS.

Grants of repurchase-able annuities by way of security.

i.—Nature and Incidents of the Security —A form of security for repayment of money advanced, which was formerly extensively used and is still adopted by some insurance societies, is that of a grant not of the estate itself, but of an annuity or rentcharge arising thereout, with a power of repurchasing the same on payment of a specified sum

Presumption in equity of right to redeem

The Courts of Equity were formerly strongly inclined to regard grants of annuities, where the power of repurchasing is given at the same time with the grant and as part of the same transaction, as being contracts not for absolute sale, but for securing a loan, and have therefore, as far as possible, disregarded any conditions as to time or mode of repayment, and treated the grants as liable to redemption in like manner as mortgages (a)

Notice of intention to repurchase

A ground for this construction arises, when the deed contains a stipulation for notice to be given of the grantor's intention to repurchase, and for repayment of the original purchase-money, with all arrears of the annuity, and a half-year's payment in addition, so as to allow ample time to find out another hand to take the money, and to secure the interest in the meantime (b)

Personal covenant for payment

The fact of there being an immediate remedy by covenant or otherwise against the person of the grantor, while there is no *present* remedy against the property (as in the ordinary power of distress and entry after default in payment for twenty-eight days), leads to an inference that the estate is only meant as a security (c) But, on the other hand, the express exemption of the grantor from all personal liability (which renders the case very similar to a Welsh mortgage) does not affect the right of

(a) *Longuet v Scawen*, 1 Ves Sen 404, *Floyer v Sherard*, Amb 18 See *Secretary of State for India v British Empire Mutual Life Ass Co*, 67 L T 434, C A

(b) *Verner v Winstanley*, 2 Sch & L 293, *Lawley v Hooper*, 3 Atk 278
(c) *Buhner v Astley*, 1 Ph 422, *Kerney v Lynch*, 2 J & L 330

redemption (*d*) ; though in some cases the absence of a covenant for payment has led the Court to treat the transaction as an absolute sale of the annuity, subject to a power of repurchase, the conditions of which must be strictly observed (*c*)

In *Bulwer v Astley* (*f*), all the above circumstances occurred in favour of the right of redemption ; and it may be observed that in all the above cases the right of repurchase was not limited to any particular time

In cases of this nature, the heir of the grantee, where the annuity is limited to the heirs, is a trustee for the executor (*g*)

At the present time, it would seem that the Court will not treat a grant of an annuity with power to repurchase as a mere redeemable security for a debt or loan without clear proof that such was the nature of the transaction (*h*)

Evidence of
nature of
transaction

Redeemable annuities are now seldom given except by tenants for life, in which cases the form of the annuity deed usually consists of the grant of an annuity for a life or lives, or for a term of years determinable upon a life or lives with a covenant by the grantor to pay the annuity.

Form of
annuity deeds
to secure
advances

ii.—Remedies of Annuitants—Formerly an annuity deed usually contained express powers of distress and entry upon the lands charged with the annuity, and a demise of the land to trustees for a term of years upon trusts to secure the annuity

Powers of
distress, &c

When an annuity is secured in the usual way by a power of entry in the annuitant and a trust term in the trustee, the power of entry is not inconsistent, even at law, with the term, and if the grantor, under the provisions of the annuity deed, becomes tenant to the trustee of the term at a rent, the annuitant can, upon default made in payment of the annuity for the period specified, bring an action against the grantor under the power of entry ; but ejectment will not lie by the trustee of the term, without notice to quit first given to the grantor It would seem that the power of entry would not be exerciseable after a mortgage made by the trustee under the trusts of the term (*i*).

(*d*) *Longuet v Scarwen*, 1 Ves Sen 404, but see *Williams v Owen*, 5 My & Cr 303

(*e*) *Mellon v Lees*, 2 Atk 494, *Floyer v Lavington*, 1 P Wms 268
(*f*) 1 Ph 422

(*g*) *Longuet v Scarwen*, 1 Ves Sen 404

(*h*) See *Knox v Turner*, L R 5 Ch A 515, *Preston v Neale*, 12 Ch D 760

(*i*) *Doe v Lord Kensington*, 8 Q B 429

CHAPTER IV

Now, however, by the Conveyancing and Law of Property Act, 1881 (*h*), it is enacted as follows —

Remedies for recovery of annual sums charged on land.

S 44 —(1) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly, or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further

(2) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid

(3) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid, and such possession when taken shall be without impeachment of waste

(4) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed, and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created

(5) This section applies only if and as far as a contrary intention

is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained

(6) This section applies only where that instrument comes into operation after the commencement of this Act

(7) This section does not extend to Ireland

iii.—Registration of Annuities.—The Annuity Act (*l*), which required the enrolment of grants of annuities or rentcharges for life or lives, or term of years, or greater estate determinable on lives, was founded on the principle that life annuities, as offering the means of evading the laws against usury, required to be watched with peculiar jealousy. When the usury laws were repealed (by 17 & 18 Vict c 90) the Annuity Act shared the same fate, but by 18 & 19 Vict c 15, s 12 (1855), after the passing of the Act, unless a memorandum is registered at the Common Pleas (now at the Central Office (*m*)) in the name of the grantor any annuity or rentcharge, granted after the passing of the Act (otherwise than by marriage settlement) for one or more life or lives, or for any term of years, or greater estate determinable on one or more life or lives, shall not affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless or until a memorandum or minute containing the name, place of abode, and title, trade or profession of the person whose estate is intended to be affected thereby, and the date of the instrument by which the annuity is granted, and the annual sum or sums to be paid, be left at the Central Office for registration according to the Act. By s 14 it is provided that the Act shall not extend to require the registry of annuities or rentcharges given by will

Grant of annuity void unless registered at Central Office

It was held, on the construction of the last-mentioned Act, that want of registration does not make a grant of an annuity void as against a subsequent purchaser or incumbrancer who had notice of it, or as against the trustee in bankruptcy of the grantor (*n*).

Effect of omission to register

(*l*) 53 Geo III c 141

(*m*) 42 & 43 Vict c 78, ss 4, 5

(*n*) *Greaves v Toftfield*, 14 Ch D 563, C A

CHAPTER V.

OF STOCK MORTGAGES.

What are
stock mort-
gages

Stock in the public funds may be the subject of loan Mortgages so framed as to secure the replacement of stock lent are usually known as stock mortgages

During the war in the early part of the century, when the price of stock was so low as to yield more than 5 per cent interest on the money invested, stock mortgages were frequent, and almost superseded money mortgages, since the repeal of the usury laws (a) they have nearly disappeared

Whether
trustees may
lend on stock
mortgage

One case in which they are sometimes employed is that of trustees who have no power to lend on mortgage, but are desirous to accommodate *cestuis que trust* with a loan of money, and to secure the re-purchase of the exact sum of stock sold instead of the repayment of the sum of money advanced. Such a loan, being a transaction by which a less perfect security is substituted for a more perfect one, is not a proper investment of trust funds, unless expressly authorized by the instrument creating the trust (b).

Loans of
stock lawful

A loan of stock was lawful, notwithstanding the Stock Jobbing Act (c) The parties may agree that a sum of money equal to the dividends shall be paid in the meantime, although the dividends shall exceed 5 per cent on the money produced by the sale of the stock; for the lender takes the hazard of the rise and fall of the market price, and if an action is brought on a bond given as a security for the transfer of stock, in estimating the measure of damages, the lender will be entitled to recover the highest value of the stock on the day of trial (d);

(a) By the stat 17 & 18 Vict c 90
Numerous cases on stock mortgages
are collected in Mr Coote's Treatise
on Mortgages (3rd ed), p 274 See
also *Att -Gen v Hollingworth*, 2 H &
N. 416, *Baskett v Skeel*, 11 W R
1019, *Goddard v Leithbridge*, 16 Beav

529

(b) *Pell v De Winton*, 2 De G & J
19

(c) 7 Geo II c 8 See *Sanders v*
Kentish, 8 T R 162

(d) *Shepherd v Johnson*, 2 East, 211.

and if a bonus has been declared on the stock, the lender will have a right to insist on the replacement of the original stock increased by the amount of bonus, and to dividends in the meanwhile on the bonus as well as on the stock (*e*). So a *bond fide* contract for the transfer of stock is good, though the transferor is not possessed of it at the time of the agreement (*f*).

It is not material whether the stock is actually transferred to the mortgagor, or whether the stock is sold out, and the net produce paid to him (*g*).

If a person is indebted to another in a sum of money, an agreement between them that the debtor shall transfer to the creditor within a given time such a quantity of stock as the amount of the debt would have purchased on the day of the agreement, and pay dividends in the meantime, is lawful (*h*).

It seems that if the re-transfer of the stock be secured merely by a bond or covenant on the failure of the borrower to replace the stock by the appointed day, the lender may recover at his option either the present value of the stock or its value upon the day when it ought to have been replaced (*i*).

Rights under
covenant to
replace stock.

Where the term is expired, redemption will be decreed on replacing the same amount of stock although the price has fallen (*k*).

By sect 2, sub-sect (6), of the Conveyancing and Law of Property Act, 1881 (*l*), the expression "mortgage" includes a charge for securing money's worth; the statutory powers of sale, &c., given to mortgagees by that Act consequently apply to stock mortgages, if effected by deed executed after the commencement of the Act

Statutory
powers of
sale, &c

(*e*) *Vaughan v Wood*, 1 My & K 403

(*f*) *Mortimer v McCallan*, 7 M & W 20

(*g*) *Tate v Wellings*, 3 T. R. 537

(*h*) *Maddock v Rumball*, 8 East, 304

(*i*) *McArthur v Seaforth*, 2 Taunt 257, see *Shepherd v Johnson*, 2 East, 211, *Shaw v Holland*, 10 Jur 103

(*k*) *Blyth v Carpenter*, L R 2 Eq 501

(*l*) 44 & 45 Vict c 41

CHAPTER VI.

OF MORTGAGES UNDER THE LAND TRANSFER ACT, 1875.

Creation of mortgage by registration

A MORTGAGE of land may now be created under the Land Transfer Act, 1875 (*a*), by registration under that Act, without the necessity for any deed or other writing

This Act, after establishing a land registry and providing for the registration of landowners, either with absolute or possessory titles, enacts as to incumbrances as follows.—

Creation of charges and delivery of certificates of charge

S 22. "Every registered proprietor of any freehold or leasehold land may, in the prescribed manner, charge such land with the payment at an appointed time of any principal sum of money either with or without interest and with or without a power of sale to be exercised at or after a time appointed. The charge shall be completed by the registrar entering on the register the person in whose favour the charge is made as the proprietor of such charge, and the particulars of the charge, and of the power of sale, if any, and the registrar shall also, if required, deliver to the proprietor of the charge a certificate of charge in the prescribed form" (*b*)

Implied covenant to pay charges.

S 23 "Where a registered charge is created on any land, there shall be implied on the part of the person being registered proprietor of such land, at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negating such implication, a covenant with the registered proprietor for the time being of the charge to pay the principal sum charged, and interest, if any, thereon, at the appointed time and rate; also a covenant if the principal sum or any part thereof is unpaid at the appointed time, to pay interest half-yearly at the appointed rate on so much of the principal sum as for the time being remains unpaid" (*b*)

Implied covenant in case of leaseholds to pay rent, &c, and indemnify proprietor of charge

S 24 "Where a registered charge is created on any leasehold land, there shall be implied on the part of the person being registered proprietor of such land at the time of the creation of the charge, his heirs, executors, and administrators, unless there be an entry on the register negating such implication, a covenant with the registered proprietor for the time being of the charge that the person being registered proprietor of such land at the time of the creation of the charge, his executors, administrators, and assigns,

(*a*) 38 & 39 Vict. c. 87.

(*b*) See Rule 20, December, 1875

CHAPTER VI.

will pay, perform, and observe the rent, covenants, and conditions by and in the registered lease reserved and contained, and on the part of the lessee to be paid, performed, and observed, and will keep the proprietor of the charge, his heirs, executors, and administrators indemnified against all actions, suits, expenses, and claims on account of the non-payment of the said rent, or any part thereof, or the breach of the said covenants or conditions, or any of them" (c)

S 25 "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may, for the purpose of obtaining satisfaction of any moneys due to him under the charge, enter upon the land charged, or any part thereof, or into the receipt of the rents and profits thereof, subject nevertheless to the right of any persons appearing on the register to be prior incumbrancers, and to the liability attached to a mortgagee in possession"

Entry by proprietor of charge

S 26 "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge may enforce a foreclosure or sale of the land charged, in the same manner and under the same circumstances in and under which he might enforce the same if the land had been transferred to him by way of mortgage, subject to a proviso for redemption on payment of the money named at the appointed time"

Foreclosure by proprietor of charge

S 27 "Subject to any entry to the contrary on the register, the registered proprietor of a registered charge with a power of sale may, at any time after the expiration of the appointed time, sell and transfer the land on which he has a registered charge, or any part thereof, in the same manner as if he were the registered proprietor of such land"

Remedy of proprietor of charge with a power of sale

S 28 "Subject to any entry to the contrary on the register, registered charges on the same land shall as between themselves rank according to the order in which they are entered on the register, and not according to the order in which they are created"

Priority and discharge of registered charges

"The registrar shall, on the requisition of the registered proprietor of any charge, or on due proof of the satisfaction thereof, notify on the register in the prescribed manner by cancelling the original entry or otherwise the cessation of the charge, and thereupon the charge shall be deemed to have ceased"

S 40 "The registered proprietor of any charge may, in the prescribed manner, transfer such charge to another person as proprietor. The transfer shall be completed by the registrar entering on the register the transferee as proprietor of the charge transferred. The registrar shall also, if required, deliver to the transferee a fresh certificate of charge, but the transferor shall be deemed to remain proprietor of such charge, until the name of the transferee is entered on the register in respect thereof" (d)

Transfer of charges on register

By ss. 42 and 43, the executor or administrator of the sole registered proprietor or of the survivor of several joint registered proprietors, and the trustee in the bankruptcy of the bankrupt registered proprietor of any charge is to be entitled to be registered as the proprietor in the place of the former owner thereof

Transmission of charge on death or bankruptcy.

By s 45, the husband of any female registered proprietor of a charge may apply to be registered as proprietor in her place. This

Effect of marriage of

(c) See Rule 20, December, 1875

(d) See Rule 21

CHAPTER VI

female prop-
rietor of
chargeNature of
title of
registered
fiduciary
proprietorEvidence of
transmission
of registered
proprietor-
shipEffect of
unregistered
dispositionsLoss and
renewal of
certificateCertificate to
be evidence.
Enactments
as to regis-
tration

enactment, of course, does not apply when the married woman is entitled to the charge for her separate use in equity, or as her separate property by statute (*d*)

S 46 "Any person registered in the place of a deceased or bankrupt proprietor shall hold the charge in respect of which he is registered upon the trusts and for the purposes to which the same is applicable by law, and subject to any unregistered estates, rights, interests, or equities, subject to which the deceased or bankrupt proprietor held the same, but, save as aforesaid, he shall, in all respects, and, in particular, as respects any registered dealings with such land or charge, be in the same position as if he had taken such land or charge under a transfer for a valuable consideration"

S 47 "The fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, shall be proved in the prescribed manner" (*e*)

S 49 "The registered proprietor alone shall be entitled to transfer or charge registered land by a registered disposition, but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered, and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned

"The registered proprietor alone shall be entitled to transfer a registered charge by a registered disposition, but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land"

By ss 78 and 79, if any certificate of charge is lost, mislaid, or destroyed, the registrar, upon being satisfied of the fact, may grant a new certificate of charge in the place of the former one, and, upon the delivery up to him of a certificate of charge, may grant a new one in its place

By s 80, any certificate of charge shall be *prima facie* evidence of the several matters therein contained (*f*)

S 83 "The following enactments shall be made with respect to registration of title —

- (1) There shall not be entered on the register or be receivable by the registrar, any notice of any trust, implied, express, or constructive, and
- (2) No person shall be registered as proprietor of any undivided share in any land or charge, and a number of persons exceeding the prescribed number (*g*) shall not be registered

(*d*) 45 & 46 Vict c 75

(*e*) The proof is to be to the satisfaction of the registrar Rule 25.

(*f*) See Rule 35

(*g*) The prescribed number is now four persons rule 37

as proprietors of the same charge, and if the number of persons showing title exceeds such prescribed number, such of them, not exceeding the prescribed number, as may be agreed upon, or as the registrar may in case of difference decide, shall be registered as proprietors, and

- (3) Upon the occasion of the registry of two or more persons as proprietors of the same land or of the same charge, an entry may, with their consent, be made on the register, to the effect that, when the number of such proprietors is reduced below a certain specified number, no registered disposition of such charge shall be made, except under the order of the Court "

S 98 "Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner "

Fraudulent dispositions

Under the Land Registry Act, 1862 (*h*), which, as regards registration of mortgages, &c, is virtually superseded by the Act of 1875, it was held that a purchaser of property registered with an indefeasible title from a first registered mortgagee is entitled under the Act to be registered with an indefeasible title, the right of the subsequent registered mortgagees of the original mortgagor being only against the surplus purchase-money (?)

Right of purchaser from first mortgagee to registration

The provisions of the Land Transfer Act, 1875, have not, as yet, had any great practical effect, and titles registered under this Act, and conveyances, by way of mortgage or otherwise, of land thus registered are not often met with in practice. Bills to amend and extend the provisions of this Act, whereby it is proposed to render compulsory the registration of titles and conveyances, have been of late years repeatedly introduced into Parliament, but, so far, without passing into law.

(*h*) 25 & 26 Vict c 53

(*i*) *Re Richardson*, L R 12 Eq 398, 13 Eq 142

CHAPTER VI

female proprietor of charge

Nature of title of registered fiduciary proprietor

Evidence of transmission of registered proprietorship

Effect of unregistered dispositions

Loss and renewal of certificate

Certificate to be evidence
Enactments as to registration

enactment, of course, does not apply when the married woman is entitled to the charge for her separate use in equity, or as her separate property by statute (*d*)

S 46 "Any person registered in the place of a deceased or bankrupt proprietor shall hold the charge in respect of which he is registered upon the trusts and for the purposes to which the same is applicable by law, and subject to any unregistered estates, rights, interests, or equities, subject to which the deceased or bankrupt proprietor held the same, but, save as aforesaid, he shall, in all respects, and, in particular, as respects any registered dealings with such land or charge, be in the same position as if he had taken such land or charge under a transfer for a valuable consideration"

S 47. "The fact of any person having become entitled to any land or charge in consequence of the death or bankruptcy of any registered proprietor, or of the marriage of any female proprietor, shall be proved in the prescribed manner" (*e*)

S 49 "The registered proprietor alone shall be entitled to transfer or charge registered land by a registered disposition, but, subject to the maintenance of the estate and right of such proprietor, any person, whether the registered proprietor or not of any registered land, having a sufficient estate or interest in such land, may create estates, rights, interests, and equities in the same manner as he might do if the land were not registered, and any person entitled to or interested in any unregistered estates, rights, interests, or equities in registered land may protect the same from being impaired by any act of the registered proprietor by entering on the register such notices, cautions, inhibitions, or other restrictions as are in this Act in that behalf mentioned.

"The registered proprietor alone shall be entitled to transfer a registered charge by a registered disposition, but, subject to the maintenance of the right of such proprietor, unregistered interests in a registered charge may be created in the same manner and with the same incidents, so far as the difference of the subject-matter admits, in and with which unregistered estates and interests may be created in registered land"

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(*g*) The prescribed number is now four persons. rule 37.

as proprietors of the same charge, and if the number of persons showing title exceeds such prescribed number, such of them, not exceeding the prescribed number, as may be agreed upon, or as the registrar may in case of difference decide, shall be registered as proprietors, and

- (3) Upon the occasion of the registry of two or more persons as proprietors of the same land or of the same charge, an entry may, with their consent, be made on the register, to the effect that, when the number of such proprietors is reduced below a certain specified number, no registered disposition of such charge shall be made, except under the order of the Court "

S 98 "Subject to the provisions in this Act contained with respect to registered dispositions for valuable consideration, any disposition of land or of a charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner "

Fraudulent
dispositions

Under the Land Registry Act, 1862 (*h*), which, as regards registration of mortgages, &c, is virtually superseded by the Act of 1875, it was held that a purchaser of property registered with an indefeasible title from a first registered mortgagee is entitled under the Act to be registered with an indefeasible title, the right of the subsequent registered mortgagees of the original mortgagor being only against the surplus purchase-money (?)

Right of
purchaser
from first
mortgagee to
registration

The provisions of the Land Transfer Act, 1875, have not, as yet, had any great practical effect; and titles registered under this Act, and conveyances, by way of mortgage or otherwise, of land thus registered are not often met with in practice. Bills to amend and extend the provisions of this Act, whereby it is proposed to render compulsory the registration of titles and conveyances, have been of late years repeatedly introduced into Parliament, but, so far, without passing into law.

(*h*) 25 & 26 Vict c 53

(*i*) *Re Richardson*, L R 12 Eq 398,
13 Eq 142

CHAPTER VII

OF EQUITABLE MORTGAGES.

SECTION I.

OF THE DIFFERENT MODES BY WHICH AN EQUITABLE MORTGAGE
MAY BE CREATED

AN equitable mortgage to secure a past debt or a present advance may be made —

- | | |
|----------------------------------|--|
| Mortgage of equity of redemption | (1) By a formal mortgage of the equity of redemption in property, when the legal estate is vested in a prior mortgagee |
| Agreement for mortgage | (2) By an agreement or any charge or other writing, however informal, which indicates with sufficient certainty the intention to create a mortgage security, provided that in the case of land such agreement or charge is sufficient to satisfy the requirements of the Statute of Frauds |
| Deposit of deeds | (3) By a deposit with the creditor of deeds, copies of court rolls, or other documents of title, either with or without a memorandum of charge, by way of security for payment of the debt or loan. |

Further advances An equitable mortgage may be given to secure a present loan and future advances (a)

Legal estate outstanding. An equitable mortgagee may obtain *ex parte* an injunction restraining the mortgagor from parting with the legal estate, if not already outstanding (b).

(a) *Ex parte Heathcote*, 1 Fonbl
N R 42

(b) *London and County Bank v Lewis*,
21 Ch D 490



SECTION II.

OF A MORTGAGE OF AN EQUITY OF REDEMPTION.

i.—Natures and Incidents of Mortgage of Equity of Redemption.—An equity of redemption is, as will be seen hereafter (e), an estate or interest of which the mortgagor, until decree of foreclosure, is possessed of his ancient and original right, and accordingly may be the subject of mortgage *toties quoties*.

Nature of equity of redemption

Where successive mortgages are made of an equity of redemption, subject to a prior legal mortgage, the first mortgagee, on being paid off, becomes a trustee of the legal estate for any subsequent incumbrancers according to their priorities, and is accordingly bound to convey the estate to the second mortgagee, who has the best right to call for it he must not convey the estate to a subsequent mortgagee so as to alter the priorities of successive equitable incumbrancers (d).

First mortgagee paid off is trustee of legal estate for subsequent incumbrancers

A second mortgagee may, upon the first mortgagee being paid off by the mortgagor, bring an action to obtain a conveyance or assignment of the legal estate, although an actual tender has been made to him by the mortgagor of the money due on the second mortgage, and even although a decree for redemption has been obtained, until the time fixed by the decree for redemption has arrived, though such a course will probably fix him with costs, if the mortgagee has had his proper notice of six months before tender made (e).

Action to compel conveyance of legal estate.

A loan on the security of a mortgage of an equity of redemption is attended with certain serious risks and disadvantages

Disadvantages of mortgages of equity of redemption

As between mere equitable incumbrancers, it is a maxim in equity—*qui prior est tempore, potior est jure* (f). On this principle each mortgagee of the equity of redemption has preference according to his priority in time (g).

But there is another important principle that must be borne in mind, viz, that where equities are equal, the law must prevail (h). The consequence is, that a mortgagee of the equity of redemption may be postponed to a subsequent mortgagee, who,

Liability to be postponed to subsequent incumbrancer who gets in the legal estate

(e) See *post*, p 627

(d) *Sharples v Adams*, 32 Beav 212

(e) *Grurgeon v Gerard*, 4 Y & C Ex 119

(f) *Brace v Duchess of Marlborough*, 2 P Wms 491, *Wilmott v Fike*, 5 Ha 14, *Jones v. Jones*, 8 Sim. 633,

and see *Willshire v. Rabbits*, 14 Sim 76, *Rooper v Harrison*, 2 K & J 100, *Lee v Howlett*, 2 K & J 531, *Consolidated, &c Co. v Riley*, 1 Giff 371

(g) See *post*, pp 1236 *et seq.*

(h) *Francis's 14th Maxim*

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having advanced his money without notice, afterwards (although then with notice) obtains possession of the legal estate. From this results a disadvantage and even danger in taking a mortgage of an equity of redemption, against which it is difficult to guard.

Liability to
be ousted by
tacking

Another disadvantage attending a mortgage of an equity of redemption is, that the first mortgagee may, previously to the second mortgage, or even subsequently to it if without notice, make further advances to the mortgagor, all of which (as also judgment or statute debts) (*i*), he will, as hereafter explained (*h*), be entitled to tack to his original mortgage in preference to the subsequent mortgage. To guard against this mischief, it is incumbent on a person lending money on an equity of redemption, first to make inquiry of the prior mortgagee into the amount of his demand and inspect the title deeds in his possession, and, secondly, to give him express notice of the proposed mortgage. And it will be advisable, if practicable, *i e*, if the first mortgagee will permit, to put notice of the second mortgage on the principal title deed, such as the conveyance to the mortgagor or the like, or on the first mortgage deed; for otherwise the mortgagor might redeem the first mortgage, and convey the legal estate to a stranger without notice, who would thus gain a preference to the prior equitable mortgagee.

Liability to
let in dower

Another disadvantage attending a mortgage of an equity of redemption is, that if the mortgagor shall afterwards redeem and take a conveyance to himself, he will, it may be thought, let in his widow's right to dower, in preference to the equitable mortgagee.

No remedy
at law for
enforcing
charge

A further disadvantage is, that the mortgagee has not the legal remedy, so far as respects the estate, for enforcing payment of principal or interest, by bringing an action against the mortgagor or his tenant for recovery of possession of the mortgaged property, now substituted for the old action of ejectment, but is driven to seek relief in equity.

Liability to
foreclosure
by legal
mortgagee.

Again, inasmuch as a second mortgagee is subject to foreclosure equally with the mortgagor at the hands of the first mortgagee, a mortgagee of an equity of redemption may find himself obliged, in order to preserve his security, to redeem the first mortgage, and so be compelled to advance a larger sum

(*i*) *Brace v. Duchess of Marlborough*,
2 P. Wms. 491

(*h*) See *post*, pp. 1219 *et seq.*

than he had originally contemplated, or perhaps than he may then be prepared to lend.

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Or, upon proceeding to foreclose, the first mortgagee may possibly be in a position to consolidate his mortgage with mortgages upon other property of the mortgagor (*l*), in which case the mortgagee of the equity of redemption will have to provide for a still greater outlay in order to preserve his security, and will also be exposed to the risk of losing his security entirely, should such other property of the mortgagor prove to be an inadequate security for the mortgages made upon it

Liability to consolidation by legal mortgagees

A further disadvantage is that a mortgagee of an equity of redemption is not entitled to the title deeds to the property mortgaged, which follow the legal estate into the hands of the first mortgagee. On this account, in the absence of the precaution above suggested, a mortgagee of an equity of redemption is constantly subjected to the risk of being postponed to a stranger obtaining the legal estate from the first mortgagee without such notice of that charge as would be imputed to a person taking such conveyance without requiring the title deeds to be handed over, or their absence accounted for (*m*)

No right to title deeds

Another disadvantage, against which no prudence can guard, is, that the mortgagor may secretly have executed prior mortgages of the equity. For so gross a fraud the legislature has enacted that his right of redemption shall be utterly lost. By the statute 4 & 5 Will III. c. 16, it is, in effect, enacted that if any person shall mortgage any lands, and again mortgage the same lands or any part thereof to another mortgagee, and shall not discover the first mortgage to the second mortgagee, he shall have no equity of redemption against the second mortgagee, who may hold the mortgaged lands free from such equity, as if he had acquired them by absolute purchase

Fraudulent concealment of prior incumbrance

It will be seen that the language of the statute is confined to a second mortgage *of the same lands*, and that the legislature does not appear to have contemplated that other estates might be also comprised in the second mortgage. To such cases it has been held, in *Stafford v. Selby* (*n*), that the statute, being penal, does not apply, unless the property joined with the equity of redemption is so inconsiderable that its introduction into the mortgage

or

(*l*) See *post*, Chap XLIII p 855,
as to consolidation

(*m*) See *post*, pp 1340 *et seq*
(*n*) 3 Vern 589

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was palpably fraudulent, and for the mere purpose of affording a pretext for the evasion of the statute

The same case also determined that, to comply with the directions of the statute, the mortgagor must give the second mortgagee notice in writing under his hand of all the prior incumbrances; and that an assignee of the second mortgage, as well as a subsequent mortgagee redeeming the second mortgage, has the benefit of the statute; but that to entitle a second mortgagee to the advantage of the statute, he must come into Court with clean hands and free from fraud

The statute does not give a right to the second mortgagee to come actively into Court to enforce the forfeiture; and in order to bring the Act into operation, both the first and second mortgages must be, in the strictest sense, mortgages reserving a right of redemption (o). The forfeiture will not arise so long as there is a legal right to redeem, but only after the stipulated time for redemption has passed, and therefore the equity of redemption alone remains (p)

Liability of
mortgagor or
his solicitor
to criminal
proceedings

By a more recent statute (q), it is enacted that any seller or mortgagor, or the solicitor or agent of such, who conceals any settlement, deed, will, or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or who falsifies any pedigree on which the title does or may depend in order to induce him to accept the title, with intent to defraud, is guilty of misdemeanour, and also liable to an action for damages at the suit of the purchaser or mortgagee, but no prosecution is to be commenced without the sanction of the Attorney-General, or, if that office be vacant, of the Solicitor-General. This section, it is conceived, can only apply to the fraudulent concealment of an *existing* incumbrance, nor will the vendor's solicitor be criminally responsible if he suppress a mere equitable charge, which has been satisfied, or which no longer affects the title (r)

Where there is a condition of sale that no title to the property sold shall be shown before a certain date, *semble*, that the above Acts do not apply to the omission of an incumbrance prior to that date (s). But there is no fraudulent concealment of a claim

(o) *Kennard v. Futvoys*, 2 Giff 81.
See *Clarke v. Hoskins*, 15 W R 1161

(p) *Dav. Conv* (4th ed.) Vol II
pt ii p 5

(q) 22 & 23 Vict c 35, s 24, as
amended by 23 & 24 Vict c 38, s 8.

(r) *Dart & Barb V. & P* (6th ed.)
Vol I, p 344

(s) *Smith v. Robinson*, 13 Ch D. 148

when the person is under no obligation to disclose it, as a witness under examination (t) CHAPTER VII

Independently of statutory enactment, a mortgagor or his solicitor, who fraudulently conceals an incumbrance on the property which is known to him, is liable in equity to a subsequent mortgagee or purchaser (u) Liability in equity

Where the existence of a legal mortgage was concealed by the mortgagor from a purchaser for value, it was held that the mortgagee was entitled to a decree of foreclosure against the purchaser, and that the latter could not avail himself of a reconveyance to the mortgagor, which, having been obtained by fraud, was declared null and void (x)

Where an incumbrance has been omitted from an abstract by the vendor, though through ignorance, he must pay it off, and cannot rescind the contract under the clause enabling the vendor to rescind if he declines to comply with any requisition (y)

On the same principle, false or incorrect representations as to incumbrances must be made good, even where the representation is made by a stranger without any intention of fraud (z), as where the representative of a mortgagor asserted that part of the mortgage had been transferred to other property (a)

ii.—Mortgage of Reversion expectant on Mortgage Term —

A legal reversion expectant on a mortgage term must not be confounded with an equity of redemption. A mortgage in fee, therefore, after a mortgage for a term of years, will, of course, take precedence of mere equitable incumbrances upon the term. But even to a mortgage of such a nature, without some degree of precaution, a degree of hazard attaches, for the first mortgagee may continue to make advances to the mortgagor after the date of the mortgage in fee, either on his original security, or on judgment or statute security; all of which he will be entitled to tack, unless he had notice of the second mortgage; and even a subsequent mortgagee of the mere equity of redemption might obtain an advantage over the mortgagee of the legal reversion Disadvantages of mortgage of reversion expectant on mortgage term

(t) *Rolt v White*, 3 De G J & S 360.

(u) *Arnot v Biscoe*, 1 Ves Sen 94.

(v) *Evans v Braknell*, 6 Ves 174, *Burrows*

v Lock, 10 Ves 470, *Richards v Barton*,

1 Esp 268. See *Edgington v Fitz-*

maurice, 39 Ch D 459, C A (liability of directors of joint stock company)

(x) *Heath v Crealock*, L R 10 Ch.

A 22

(y) *Re Jackson and Oakshott*, 14 Ch.

D 851

(z) *Shm v Croucher*, 1 De G F &

J 518

(a) *Att-Gen v Cox*, 3 H L C. 240.

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by procuring an assignment of the first mortgage, to which he might tack his equitable charge if he had not notice of the intervening mortgage at the time of advancing his money. To guard against the first of these dangers, it is proper for the mortgagee of the legal reversion to make the like inquiries of the mortgagee of the term, and to give him the like notice, as above mentioned, in the case of a mortgage of the equity of redemption. And against the second danger, the notice to the first mortgagee might be of service (b)

SECTION III.

OF AGREEMENTS FOR MORTGAGES

Agreement
to borrow or
lend not
specifically
enforceable

i.—As to Specific Performance, &c. of Agreements for Mortgages.—Specific performance will not be enforced of a mere agreement either to borrow (c) or to lend (d) on mortgage so long as it remains executory, without any performance of the terms of the agreement by either the lender or the borrower

Specific per-
formance of
agreement to
secure past
debts

But the Court will specifically enforce an agreement to give security for a past debt in consideration of forbearance (e), or for money actually advanced before or at the time of the agreement (f), unless the borrower is prepared to pay off the money. Such an agreement, however, if it relates to land, is within the Statute of Frauds, and, except in the case of a deposit of deeds (g), must be evidenced by a sufficient memorandum in writing to satisfy the Act (h). But if the agreement is to give security on personalty, it is not within the Statute (h), and an oral agreement on such security would, apparently, be capable of being enforced, if for an antecedent debt, or if followed by an actual advance on the faith of the agreement by the mortgagee.

(b) Coote on Mortgages (5th ed), Vol I pp 411, 412

(c) *Rogers v Chalks*, 27 Beav 175, *Channon v Sainsbury*, 6 Jur N S 1318

(d) *Sichel v Mosenthal*, 30 Beav 371, *Lewis v Gurety*, L R 5 P C 346. See *Hunter v Langford*, 2 Moll 272

(e) *Alliance Bank v Broom*, 2 Dr & Sm 289, *Carew v Arundell*, 8 Jur N S 71, *Hermann v Hodges*, L R

16 Eq 18, *Jones v Greatwood and Mahon v. Hughes*, Seton on Decrees (5th ed), p 1694

(f) *Exp Jones*, 4 D & C 750, *Ashton v Corrigan*, L R 13 Eq 76, *Hermann v Hodges*, L R 16 Eq 18. And see *Parish v Poole*, 53 L T 35.

(g) See post, pp 54 et seq

(h) 29 Car II c 3, s 4. See *Exp. Broderick, Re Beetham*, 18 Q B D 766, C A, and per Romilly, M R, in *Rogers v Chalks*, 27 Beav at p 178

So, specific performance was decreed of an agreement to give a mortgage to secure money to be lent, where part had been already advanced (*h*)

Where an equitable charge has been created by agreement in writing for a mortgage, or by deposit of deeds or otherwise, to secure an existing debt, the charge may, by verbal agreement, be held by the mortgagee as a security for further advances (*l*). Extension of charge to future advances

But a verbal agreement that a simple contract debt shall be tacked to a subsisting legal mortgage of land is void under the Statute of Frauds (*m*). Tacking

Damages may be recovered for a breach of an agreement to lend on mortgage in respect of the expenses actually incurred of the abortive loan, but not, apparently, extending to consequential injury (*n*). Damages for breach of agreement for loan

In equity, damages could not have been recovered for the breach of such an agreement, under 21 & 22 Vict. c. 27, inasmuch as the plaintiff would have had no case for specific performance at the time of issuing his writ (*o*); but under the Judicature Act, 1873 (*p*), an action can now be brought in the alternative, either for specific performance or damages (*q*), and the plaintiff will be entitled to damages, even though there may have been no such performance as to render the agreement enforceable (*r*)

An agreement is often made by the borrower to pay the lenders, if the loan goes off, reasonable costs, which will not include banker's commission or costs of remittance; nor, apparently, the costs of realizing securities for the purpose of making the advance, unless such matters are expressly provided for (*s*). Nor will such an agreement entitle the intending mortgagee to interest or compensation for money lying idle pending the completion of the mortgage (*t*) Costs of abortive transaction

In the absence of contract, the proposed lender has no claim against the borrower for the preliminary expenses (*u*). It is near that the solicitor of the lender has no such claim against Preliminary expenses

(*h*) *Hunter v Lord Langford*, 2 Moll

(*l*) *Exp Heathcote*, 1 Fonb Bky
(*i*) *Baynard v Woolley*, 20 Beav 583,

(*m*) *Exp Hooper*, 1 Mer 7.

(*n*) *Duckworth v Ewart*, 10 Jur

(*o*) *Rogers v Challs*, 27 Beav 175

(*p*) 36 & 37 Vict c. 66, s. 24

(*q*) See R S C, Ord XX r 6

(*r*) See *Fritz v Hobson*, 14 Ch D

542

(*s*) *Re Blakesley*, 32 Beav 379

(*t*) *Sweetland v Smith*, 1 Cr & M

585

(*u*) *Melbourne v Cottrell*, 29 L T
293, *Holbornow v Lloyd*, 5 Jur N S
114, pt 2

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the borrower (*x*). But where the mortgage of an infant's estate in Chancery goes off, without any default of the mortgagee, the Court allows his expenses of investigating the title (*y*).

An agreement for a mortgage should always provide for the payment of the preliminary expenses by the mortgagor, and should expressly include any special expenses which may be incurred in connection with the advance.

ii.—As to Agreements operating as Equitable Mortgages —

Informal agreement for mortgage may create immediate equitable charge

Any agreement in writing and properly signed, however informal, by which any property, real or personal, is to be a security for a sum of money owing or advanced, is a charge, and amounts to an equitable mortgage. Thus an agreement that a creditor shall hold land at a fair rent, to be retained in satisfaction of the debt, is in the nature of a mortgage, and will be supported (*z*). So an informal document, signed by a trustee, admitting a breach of trust, with these words, "holding the deeds of my house and policies of assurance as a collateral security" (*a*).

Covenant to charge land

An express covenant or agreement in writing to make a mortgage, in consideration of an actual advance made at the time of the agreement, is sufficient, on the principle of equity that what has been agreed to be performed shall be performed in specie, and creates a specific charge as against simple contract creditors (*b*). A covenant for good consideration to charge or convey particular lands, or all the present estates of the covenantor, or estates over which he has power (*c*); or such as he may hereafter acquire of a specified kind, or as may be derived from a specified source (*d*); or lands which he may acquire at any time, will create a charge on that property (*e*); and lands which the covenantor had then purchased and paid for, but the conveyance of which was afterwards

(*x*) *Rigley v Daykin*, 2 Y & J. 83, *Wilkinson v Grant*, 18 C B 319

(*y*) *Craggs v Grey*, 35 Beav 166

(*z*) *Morony v O'Dea*, 1 Ba & Be 109

(*a*) *Baynard v Woolley*, 20 Beav 583

(*b*) *Hanley v Vernon*, 2 Cox, 12, 14, *Burn v Burn*, 3 Ves 582, *Matthews v Cartwright*, 2 Atk 347. See also *Meux v Smith*, 11 Sim 410, *Tebb v Hodge*, L R 5 C P 73

(*c*) *Smith v Smith*, 1 Y & C Ex 338, *Priddy v Rose*, 3 Mer 86, *Woodgett v Giesley*, 8 Sim 180. And see *Burridge v Rowe*, 1 Y & C C C 583, *Williams v Lucas*, 2 Cox, 160

See *Girling v Lee*, 1 Vern 63,

v Daly, 1 Sch & L 355, *Cole*

v Carpenter, 1 Vern 440, *Eustice*

Keightley, 4 Bro P C 588, *Fother*

v Fothergill, 2 Freem Ch 256, *Fram*

moult v Dedre, 1 P Wms 429,

Ravenshaw v Hollier, 7 Sim 3, *Legard*

v Hodges, 1 Ves Jun 477, *Eyre v*

McDowell, 9 H L C 619

(*d*) *Metcalf v Archb York*, 1 My

& Cr 547, *Lyde v Mynn*, 1 My & Cr

683

(*e*) *Lyster v Broughs*, 1 Dr &

Wal 149, *Stack v Royce*, 1 Cr &

Ch 246.

ained, were held to fall within the covenant (*f*), so also, if, in a subsequent instrument, point out particular lands (*g*), has acquired lands for the purpose of the charge (*h*)

A covenant that land settled under a marriage contract was of a certain yearly value, was held to be a charge on the real state of the covenantor (*i*), so an agreement by a mortgagee, a solicitor, to charge a mortgage which he afterwards sold, was held to be a charge on the purchase-money of the mortgage which he had invested to secure a part of the mortgage (*l*), so a tenant to settle or charge lands of a certain value by a certain time will bind even after-purchased lands which belong to the covenantor at that time (*l*); and the parties entitled to the benefit of the covenant will take vested interests, though they die before the time fixed for the execution of the covenant (*m*) So a covenant to settle or charge all lands to be acquired during a certain time (*n*)

A written instrument, promising to pay a sum of money with interest "out of the estate of the deceased W H," and signed by all the persons interested in his estate, has been held to constitute (the personalty being exhausted) an equitable mortgage on the real estate (*o*) Similarly a letter to the executor by a debtor to an estate, saying that he might retain the debtor's title deeds till the latter got the whole of his affairs settled with the executors (*p*) So a memorandum by a husband to charge all his interest in the future property of his wife (*q*).

What agreements and instruments will create an equitable mortgage

Where a tenant for life of real estate covenanted on the marriage of his daughter to pay her an annuity, and in order to secure the same appointed a receiver of the rents and profits of

Receivership deed

(*f*) *Warde v Ward*, 16 Beav 103 But see *Gardner v Marq Townshend*, 30 Coop 301

(*g*) *Watson v Sadler*, 1 Moll 585

(*h*) *Wellesley v Wellesley*, 4 My & Cr 561 See *Mornington v Keane*, 2 De G & J 311

(*i*) *Probert v Morgan*, 1 Atk 440 See *Farber v Harvey*, 4 Bro P C 304, *Glegg v Glegg*, 4 Bro P C 614 (*k*) *Exp Rogers*, 8 De G M & G 71

(*l*) *Deacon v Smith*, 3 Atk 323, *undell v Bready*, 2 Vern 483, examined and corrected in *Mornington v Keane*, 2 De G & J 292, at p 1 *Lyde v Myrm*, 1 My & K. 683

See *Thompson v Cohen*, L R 7 Q B 527, *Wellesley v Wellesley*, *sup*, *Tooke v Hastings*, 2 Vern 97, *Needham v Smith*, 4 Russ 318, *Piebble v Boghurst*, 1 Swanst 321, *Tew v Earl of Winterton*, 3 Bro C C 493, *Pitt v Jackson*, 2 Bro C C 51, cannot be relied on

(*m*) *Naylor v Wetherell*, 4 Sim 114

(*n*) *Lewis v Madocks*, 17 Ves 48, *Wethered v Wethered*, 2 Sim 183

(*o*) *Suart v Toulmin*, 2 Pow Mtg 1049 b, ed 6

(*p*) *Fenwick v Potts*, 8 De G M & G 506

(*q*) *Carew v Arundell*, 8 Jur N S 71.

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	the land, it was held that the deed created a valid equitable charge upon the land (v)
Power of attorney	A power of attorney, authorizing a party to take possession of lands and hold them until paid a certain sum, amounts to a contract to charge, and is not revoked by the death of the grantor (s)
Right of entry and sale, &c	A covenant that if payment be not made the creditor may by entry, foreclosure, sale, or mortgage, levy the amount from the lands of the debtor, is an equitable mortgage (t)
Declaration of trust	A letter or memorandum given by a solicitor to his client stating that a sum of money entrusted to the solicitor for investment was in his hands at interest, being part of a sum advanced to P on security of freeholds at K, was held, no such mortgage having, in fact, ever been made, to create a valid equitable charge on the share of the solicitor in the proceeds of sale of lands at K, which he and P had purchased for resale as a joint adventure (u).
Advance on contract	Advances on a railway contract were held to create an equitable lien on the profits of it (x)
Receipt.	Where a relation paid off a mortgage and took a receipt from the mortgagee, he undertaking to reconvey, it was held an equitable mortgage (y)
Conditional agreement to postpone security	So, a parol agreement for a mortgagee to give up his security to a new mortgagee paying off a part of the mortgage, on the understanding that he was to have a second mortgage for the residue, was held to create a valid second mortgage (z)
Recitals	Also a recital of the obligor of a bond for 3,000 <i>l</i> , that, on the execution of a will of real estate in his favour, he had promised to provide for the obligee, was held to have created a lien on the real estate for the 3,000 <i>l</i> (a). Similarly, a recital in an assignment of rent reserved by a lease to a creditor, but in which no further interest in the lease was conveyed, that a security

(v) *Cradoch v Scottish Provident Institution*, W N (1894) 88, C. A.

(s) *Spooner v Sandilands*, 1 Y & C C 390, *Abbott v Stratton*, 3 J & L 603, *Walsh v Whitcomb*, 2 Esp 565, *Gauwen v Monton*, 10 B & Cr 731, *Bennett v Cooper*, 9 Beav 252.

(t) *Eyre v McDowell*, 9 H L C 620, *Hodgson's Case*, 1 G & J 13, *Stuart's Case*, 2 Sch & Lef 381, *Exp Jones*, 4 D & C 750, *Re Fawcett*, 13 L T N S 26, *Tebb v Hodge*, L R 5 C P 73.

(u) *Re Crowdy, Burgess v Crowdy*, 46 L T 71. See also *Middleton v Pollock, Exp Wetherall*, 4 Ch D 49.

(x) *Tusnam v Hudson*, 8 Jur N S 476, reversed on other points, 4 De G F & J 462.

(y) *Fenwick v Potts*, 8 De G M & G 506.

(z) *Banks v Whittall*, 1 De G & S 536, *Beckett v Cordley*, 1 Bro C 353.

(a) *Exp Atkins*, 2 Y & C Exc 5.

intended, was held to be an equitable charge on the lease, entitled the creditor to insist on a legal mortgage (*b*)

An agreement to execute on demand a mortgage of lands on failure to pay notes or bills when due, was held to create an immediate equitable mortgage of the lands for the amount of notes and bills unpaid at maturity, the words "on demand" having reference to the execution of a legal mortgage (*c*).

Effect will be given to an intention to create a security, notwithstanding any mistake in the manner of making it (*d*); and securities will take effect according to the intention of the parties, both as to the quantity of the property charged, and the extent of the mortgagor's interest in it (*e*).

The intention of the parties as regards the terms and extent of the security may be established by parol evidence (*f*)

Where in an equitable agreement a charge was stated to be on three houses in a certain lease, which only, in fact, comprised one house, evidence was admitted to explain the mistake (*g*)

A memorandum of charge by a solicitor on a mortgage debt, misrepresented as existing, was held an equitable mortgage upon an indemnity fund set apart when the mortgage was paid off (*h*)

An ineffectual attempt to make a legal mortgage which fails for want of some formality, as enrolment, or (formerly) presentation of a surrender of copyholds, is valid as an equitable charge, and gives the mortgagee a right to a perfected assurance (*i*). So a power or warrant of attorney to confess judgment in ejectment, which proved defective as such, was held to create a valid equitable charge (*j*).

An acknowledgment of a debt with an undertaking to hold the deeds of a house as security, was held an equitable charge on the house (*k*)

An agreement for a legal mortgage means a first mortgage not only in the case of land, but, by analogy, in the case of a ship (*l*).

Agreement to execute mortgage on demand

Effect given to agreement notwithstanding mistake, &c

Parol evidence

Misrepresentation

Effect given to defective assurances, &c

Undertaking to hold deeds as security

Agreement for legal mortgage

(*b*) *Exp Wills*, 1 Ves Jun 162

(*c*) *Re Hurley's Estate* (1894), 1 Ir R 488

(*d*) *Re Strand Music Hall Co*, 3 De G J & S 147, *Exp Rogers, Re Selby*, 3 De G M & G 271

(*e*) *Wainwright v Hardisty*, 2 Beav 363, *Grievson v Kirsopp*, 5 Beav 283, *Woodburn v Grant*, 22 Beav 483

(*f*) *Banks v Whitall*, 1 De G & S 536, see *Beckett v Coraley*, 1 Bro. C. C 353, *Exp Atkins*, 2 Y & C

Ex 536

(*g*) *Re Boulter, Exp Nat Prov Bank of England*, 4 Ch D 241

(*h*) *Exp Rogers, Re Selby*, 8 De G M & G 271

(*i*) *Mastoe v Gillespie*, 11 Ves 626, *Taylor v. Wheeler*, 2 Salk 449

(*j*) *Dale v Southwick*, 2 Vern 151

(*k*) *Baynard v Woolley*, 20 Beav 583

(*l*) *Thompson v Clark*, 1 N R. 19.

CHAPTER VII

Power of sale

Statutory powers of sale, &c

Special provisions

An agreement to give a mortgage with an immediate power of sale will be enforced (*m*)

An agreement under seal to give a legal and proper mortgage with a power of sale, will import into the security the statutory powers of sale for the time being in force, and such powers will be exerciseable though no legal mortgage has been executed (*n*)

Where an agreement for a mortgage contains a stipulation that the principal shall not be called in for a certain time, a condition will be implied that the forbearance to call in the money shall depend upon punctual payment of the interest, and, if the property be leasehold, on performance and observance by the mortgagor of the covenants of the lease, and the Court will compel the mortgagor to execute a legal mortgage on those terms (*o*).

An agreement to give a mortgage *simpliciter* will authorize the insertion of a power of sale in the mortgage deed, so as to prevail against a mesne assignee of the equity of redemption taking the legal estate, who will be a trustee thereof for the purchaser from the mortgagee under the power (*p*).

An agreement to give a legal mortgage in such form and containing such stipulations as the mortgagee shall require, will not enlarge the subject-matter of the charge, but will only impose on the mortgagor the obligation to perfect the charge (*q*)

The mortgagor must bear the costs of perfecting an equitable security by conveyance, or, in the case of copyholds, by procuring himself to be admitted, if necessary, and by surrendering to the mortgagee, including fines and fees (*r*).

Costs of perfecting equitable charge

SECTION IV.

OF A MORTGAGE BY DEPOSIT OF TITLE DEEDS.

i.—Nature and Incidents generally of a Mortgage by Deposit.

—The Statute of Frauds enacts (*s*) that no "action shall be brought upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, be in writing, and signed by the

(*m*) *Ashton v Corrigan*, L R 13 Eq 76, *Hermann v Hodges*, L R. 16 Eq 18

(*n*) *Re Solomon and Meagher's Contract*, 40 Ch D 508

(*o*) *Seaton v. Twyford*, L R. 11 Eq 591

(*p*) *Lough v. Lloyd*, 2 De G J & S 330

(*q*) *Whitley v. Chalks*, (1892) 1 Ch 64, C A

(*r*) *Pryce v Bury*, 2 Drew 41, affirmed 18 Jur 967 See post, p 1192

(*s*) 29 Car II c 3, s 4

Statute of Frauds

CHAPTER VII

to be charged therewith, or some other person thereunto lawfully authorized "

As a general rule, therefore, an agreement to give a mortgage of lands, tenements, or hereditaments of any tenure, or on any interest in or concerning them, to secure a debt or advance, must be in writing and signed by the intending mortgagor or his agent.

Agreement for mortgage of land must be in writing

But to this rule there is an important exception. A deposit of title deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or a sum of money advanced at the time of the deposit, operates as an equitable mortgage or charge, by virtue of which the depositor acquires, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself. A mere delivery of the deeds will have this operation without any express agreement, whether in writing or oral, as to the conditions or purpose of the delivery, as the Court would infer the intent and agreement to create a security from the relation of debtor and creditor subsisting between the parties, unless the contrary were shown; and the delivery would be sufficient part performance of such agreement to take the case out of the statute (*t*).

Exception as to mortgages by deposit of deeds

A deposit of copies of court rolls will have the same effect in the case of copyholds (*u*).

As to copyholds

Where, therefore, a sale or mortgage of copyholds is contemplated, the intending purchaser or mortgagee should not be satisfied with searching the court rolls for incumbrances; he ought to require the vendor or mortgagor to produce an abstract of his title, and the copy of his admission to the copyhold tenement (*x*).

Previously to the establishment of the doctrine of equitable mortgage by deposit of title deeds, it was held that the mere possession of the title deeds of an estate gave the holder no interest in the estate itself, except collaterally, as in the instance put by Lord Eldon (*y*); that is, if the owner of the lands could not part with the estate without the deeds, he should not have them without paying the debt due from him to the holder, so

Establishment of the exception.

(*t*) *Burgess v Moxon*, 2 Jur. N S 1059, and other cases cited *inf*

(*u*) *Exp Warner*, 19 Ves 202, *Lewis v John*, 9 Sim 386 *Winter v Lord Anson*, 3 Russ 488, 493, *Whitbread v*

Jordan, 1 Y & C Ex 303

(*x*) *Whitbread v Jordan*, *supra*

(*y*) *Exp Whitbread*, 19 Ves 211

And see *Exp Kensington*, 2 V & B 83

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that the possession of the deeds gave no direct interest estate, but gave to the creditor an interest arising out of an equitable power of embarrassing the property in the sale (s). And it is considered that to give the creditor a charge on the land without an agreement in writing would be in direct contravention to the Statute of Frauds.

The first decision in favour of the doctrine of equitable mortgage by deposit of title deeds was made by Lord Thurlow, C, in *Russell v Russell* (a), and was followed by him in other cases (b). These decisions are the foundation of the doctrine, which, however much it has excited the disapprobation of succeeding judges (c), has now become firmly established.

Verbal agreement without deposit

A verbal agreement for a deposit, not accompanied by an actual deposit, is void under the Statute of Frauds (d). But the deposit will create an equitable mortgage for the debt then due, although there be not one word spoken at the time (e).

If there is a parol agreement to give security for a debt, and title deeds are subsequently delivered to the creditor, this will be a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and the security will relate back to the time of the agreement (f).

Where a deposit had been made to secure an usurious loan before 17 & 18 Vict c 90, a verbal agreement, subsequent to the statute, for a legal mortgage for the same loan, was held valid without a return and fresh deposit (g).

(z) See *Head v Egerton*, 3 P Wms 279. As a general rule the title deeds follow the legal estate (see *Smith v Chichester*, 2 Dr & War 393), and the owner of such estate may maintain trover for them as against a depositor (*Harrington v Price*, 3 B & Ad. 170, *Hooper v Ramsbottom*, 6 Taunt 12, see *Goode v Burton*, 1 Exch 189), but a tenant in fee simple may give or grant away the deeds of his land, and the heir would have no remedy. Shep Touchet by Preston, 241. Similarly, an obligation or policy of insurance may be given away without an assignment, and trover would not lie for the document by the owner of the money secured. See *Barton v Garner*, 3 H & N 387, *Rummens v Hare*, 1 Ex D 169, *Thimner v Danby*, 25 L J Ch 424. If, after such a gift, a legal mortgage or assignment were made of the land or debt, the mortgagee or assignee would have a difficulty in

recovering the documents of title.

(a) 1 Bro C C 269.

(b) *Featherstone v Fennell*, *Hunford v Carpenter*, 1 Bro C C 270, note.

(c) *Exp Haigh*, 11 Ves 403, *Norris v Wilkinson*, 12 Ves 192, *Exp Whitbread*, 19 Ves 211, *Exp Hooper*, 1 Mer 7.

(d) *Exp Hooper*, *sup*, *Exp Coombe*, 4 Madd 249. See *Moux v Smith*, 11 Sim 410, *Tebb v Hodge*, L R 5 C P 73, *Exp Perry*, 3 M D & De G 252, *Exp Hallifax*, 2 M D & De G 544. A party intending to rely on the Statute of Frauds must plead the same. See Ord XIX r 15.

(e) *Exp Mountfort*, 14 Ves 606, *Exp Langston*, 17 Ves 230, *Exp Kensington*, 2 V & B 79, 83, *Bozon v Williams*, 3 Y & J 152.

(f) *Edge v Worthington*, 1 Cox, 211.

(g) *James v Rice*, 5 De G M & G. 461.

here there is a memorandum of agreement for a security CHAPTER VII

Deposit of deeds, the security will be upheld so as to Written agreement without deposit
 charge the property, though no deeds have actually been
 deposited (*h*), or even though some of them may not have been
 executed (*i*)

Where a deposit of deeds by way of security is accompanied Deposit entitles lender to legal mortgage,
 by an agreement in writing to execute a legal mortgage, it is
 clear that such agreement will be specifically enforced (*h*) But
 where there is no such agreement, and even where no memo-
 randum of charge whatever accompanies the deposit, it has been
 held that the mere deposit entitled the holder to have a legal
 mortgage, such being presumed to have been the intention of
 the parties (*l*)

But where a deposit is made as an indemnity to a surety, he except in case of surety
 is not entitled to a legal mortgage, only to a memorandum stating
 the purpose of the deposit (*m*)

ii.—Memorandum accompanying Deposit of Deeds.—Where a Parol evidence not admissible to control terms of memorandum of deposit
 deposit of title deeds is accompanied by a memorandum in
 writing, the nature and amount of charge, and the conditions of
 the contract intended to be created by the deposit, must be
 ascertained solely by reference to the written document (*n*)
 And extrinsic evidence is not admissible to raise an inference
 contrary to the express language of the document stating the
 terms on which the deposit was made (*o*)

But parol evidence may be admitted to explain ambiguities in
 a memorandum of deposit (*p*). Where there was an unstamped
 agreement between the parties, which was inadmissible as
 evidence, Lord Eldon allowed other parol evidence to be
 adduced to establish the equitable mortgage (*q*)

(*h*) *Exp Sheffield v Union Bk Co, Re Carter*, 13 L T N S 477, *Exp Leathes*, 3 D & C 112, *Exp Heathcoate*, 2 M D & De G 711

(*i*) *Exp Orrett*, 3 M & A 153, *Exp Smith*, 2 M D & De G 587

(*k*) See *ante*, p 48

(*l*) *Birch v Ellames*, 2 Anst 428, *Featherstone v Fenwick*, 1 Bro C C 270, n, *Harford v Carpenter*, *ibid*, *Hanky v Vernon*, 2 Cox, 10, *Exp Comyn*, 9 Ves 115, *Monkhause v Corporation of Bedford*, 17 Ves 380, *Exp Wright*, 19 Ves 255, *Pryce v. Bury*, 2 Drew. 41.

(*m*) *Sporle v Whayman*, 20 Beav 607

(*n*) *Shaw v Foster*, L R 5 H L 321, 341 See *Sporle v Whayman*, 20 Beav 607, *Burton v Gray*, L R 8 Ch A 932

(*o*) *Exp Coombe*, 17 Ves 369 See *Exp Kensington*, 2 V & B 79, *Ede v Knowles*, 2 Y & C C C 172, *Exp. Borrodale*, 2 M & A 398

(*p*) *Ede v Knowles*, 2 Y & C C C 172, *Re Boulter, Exp. National Provincial Bank of England*, 4 Ch D 241

(*q*) *Hiern v Hill*, 13 Ves 114

CHAPTER VII

Deposit for
special
purpose

The charge is restricted to the special purpose in the m
random accompanying the deposit, and the conditions the
must be complied with (v) equitab

Where a partner in a firm deposited with a bank certain shar
certificates to secure a private debt, and the shares became th^{session}
property of the firm, it was held that the bank was not entitled^s to a
to retain the certificates as security for a debt due from the^{the}
firm (s)

Enlargement
of purpose

When the deposit is made for a particular purpose, that pur^{av}
pose may be enlarged by a subsequent agreement, either in
writing, or proved by parol evidence, without an actual re-
delivery; as when deeds are deposited to secure advances by a
banking firm, the deposit may be extended by agreement to
secure advances made by the bank after a change of partners (t)
There is a constructive redeposit with each successive firm (u)
But there is no presumption of such agreement (t)

Intent to give
security
essential to
charge by
deposit

iii.—Deposit must be by way of Security.—The deposit must
be made with the view and intent of an immediate security and
not *diverso intuitu*. So where a debtor whose deeds relating
to certain freehold property were in the possession of his
bankers as security for a debt due to them, gave to them an
unsigned order to deliver over the deeds, so soon as their lien
should have been satisfied, to another creditor, and at the same
time handed to the creditor two leases of other property, it was
held that there was one entire agreement for a deposit of all the
deeds (subject, as to those relating to the freehold, to the
bankers' lien) by way of security for the debt due to the other
creditor, and that there had been such part performance of that
agreement as to take the case out of the Statute of Frauds and
create a valid equitable mortgage on the freeholds (x). But
where a debtor gave a verbal promise to a bank that he would,
when required, give security for a debt, and the title deeds of
certain property in which he was beneficially interested subse-
quently came into the possession of the manager of the bank,
who was also beneficially interested in the property, for purposes

(v) *Wylde v Radford*, 9 Jur N S
1169, *Exp Robinson*, 1 D & C 119,
Burton v Gray, L R 3 Ch A 932

(s) *City Bank Case*, 3 De G F & J
629

(t) *Exp Kensington*, 2 Ves & B 79,

Ede v Knowles, 2 Y & C C C 172

(u) *Exp Oakes*, 2 M D & De G
234, *Smith v Gye*, 2 M D & De G
314

(x) *Daw v Terrall*, 33 Beav. 218
See *Re McMahon*, 55 L T. 763

ing to payment of succession duty, the debtor verbally stated to the retention of the deeds by the bank as security for their claim, it was held that, the deeds having come into the possession of the bank for another purpose, there had been no such part performance of the promise to give security as to exclude the operation of the statute, and to create an equitable charge in favour of the bank (y)

So, where a person applied to his bankers for a loan on the security of the deposit of a lease, which they declined, but he left it with them without stating for what purpose the lease was so left, it was held that this gave the bankers no lien in respect of an outstanding debt due by the owner of the lease to the bankers (z).

As between a debtor and his creditor, however, the mere fact of possession of deeds by the latter generally raises a presumption that they were deposited with him as security for the debt; and the burden of proof lies upon the debtor to rebut the presumption (a). This presumption, however, will not apply to a case where a legal mortgagee is found to be in possession of title deeds relating to property of the debtor other than that expressly comprised in the mortgage deed (b).

Presumption that deeds in the hands of a creditor are held as security

But as against third persons, a mere deposit of deeds without a memorandum in writing will create an equitable mortgage only where the possession of the title deeds can be accounted for in no other manner; as where the holder of the deeds was a stranger to the title and the lands (c). Where the origin of the possession of title deeds by a bond creditor was not explained, it was held that there was no such deposit as to create an equitable charge on the lands as against persons interested therein under the will of the testator (d). Where the deposit is made for securing a sum to the trustees of a voluntary settlement, the intention must be clearly shown (e).

The proof of the relation of the debt to the deposit must be supported by proper evidence at the hearing (f); for if the evi-

Evidence

(y) *Exp Broderick, Re Beetham*, 18 Q. B. D. 766, C. A.

(z) *Lucas v. Dorrien*, 7 Taunt. 278.

(a) *Russell v. Russell*, 1 Bro. C. C. 269, *Burgess v. Moxon*, 2 Jur. N. S. 1059. See *Exp Wright*, 19 Ves. 258.

(b) *Wardle v. Oakley*, 36 Beav. 27.

(c) *Bozon v. Williams*, 3 Y. & J. 152.

(d) *Chapman v. Chapman*, 13 Beav. 308. See *Dixon v. Muckleston*, L. R. 8 Ch. A. 155, 162.

(e) *James v. Byader*, 4 Beav. 600.

(f) *Chapman v. Chapman*, *sup.*; *Kebell v. Philpot*, 7 L. J. N. S. Ch. 237.

CHAPTER VII

Deposit with
creditor's
solicitor

dence is not sufficient, there will be no inquiry (g) In case of loss of the deeds verbal evidence is sufficient (h) equitab

Where there is an agreement to give a mortgage, accompanied by the delivery of the deeds to the creditor's solicitor for the purpose of preparing a legal mortgage, the intent to create a mortgage to a mortgagee will be presumed, and the delivery will constitute a present equitable mortgage by deposit of deeds though the agreement is not in writing (i) It has been held that such a mortgage delivery must be clearly shown to be made with the intention of immediately securing an existing debt or a present advance, and not merely for the purpose of having a legal mortgage prepared to secure such debt or advance; but the decisions referred to (k) are contrary to the current of authority, and may apparently be regarded as obsolete

Deposit with
debtor's
solicitor

A deposit of deeds with the debtor's own solicitor, to be held by him until a mortgage is executed, and then to be handed over to the creditor, creates an equitable charge, and constitutes the solicitor a trustee for the creditor (l)

Whether
deposit covers
further
advances

iv.—Whether a Deposit covers further Advances—If it appears that a deposit of deeds is made for the purpose of gaining credit, it will not cover moneys previously advanced and then due (m), unless an intention to cover them appears from the circumstances (n).

But the deposit may be a security as well for debts actually due as also for future advances, if such intention is made out by oath uncontradicted, or other sufficient evidence (o); and generally, a verbal agreement for a subsequent advance on a deposit of deeds already made for the purpose of securing an existing debt, is sufficient to constitute an equitable mortgage as to the subsequent advance (p).

(g) *Keble v Philpot*, 7 L J N S Ch 237. See *Holden v Hearn*, 1 Bear 456

(h) *Baskett v Sheel*, 11 W R 1019

(i) *Exp Bruce*, 1 Rose, 374, *Exp Wright*, 19 Ves 258, *Keys v Williams*, 3 Y & C Ex 55 See *Hockley v Bantock*, 1 Russ 141

(k) *Norris v Wilkinson*, 12 Ves 192, *Exp Bulteel*, 2 Cox, 243

(l) *Lloyd v Attwood*, 3 De G & J 614

(m) *Mounifort v Scott*, T & R 274

(n) *Exp Farley*, 1 M D & De G. 683, *Exp Smith*, 2 M D. & De G.

314

(o) *Exp Mountfort*, 14 Ves 606, *Exp Langston*, 17 Ves 230 And see *Exp Hooper*, 19 Ves 477, *Shepherd v Tilley*, 2 Atk 348

(p) *Exp Kensington*, 2 V & B 97, *Exp Whitbread*, 19 Ves 209, *Exp Lloyd*, 1 Gl & J 389, *Exp Nettleship*, 2 M D & De G 124, *Ede v Knowles*, 2 Y & C C C 178, *Exp Sanders*, 3 L J N S Bky 92, *Exp Marsh*, 2 Rose, 239, *Exp Smith*, 2 M D & De G 814, 318

ere a mortgage by deposit was made to secure the debtor's
 t until such account should not exceed 100l, and the
 r died indebted to the mortgagee beyond that sum, it was
 that the deposit was a security for the whole sum, and not
 ly for the excess above the 100l (q)

The deposit of deeds with the creditor's solicitor for the pur-
 pose of preparing a legal mortgage to secure an antecedent debt
 and future advances, though unaccompanied by any written
 agreement, will cover future advances (r)

v.—What Deeds, &c must be deposited —In order to constitute the equitable mortgage by deposit, there need not be a delivery of all the title deeds (s) In *Exp Wetherell* (t), the question was, what was the effect of the delivery of the title deeds to one moiety only of the estate, the title deeds of the other moiety being retained by the debtor and passing into the possession of his assignees, the mortgagees having understood that the deeds delivered to them related to the entirety Lord Eldon, C, thought that, under the circumstances of that case, there was sufficient evidence in writing (and on this he grounded his decision) that there should be a mortgage of the entirety, and, consequently, he did not determine, to use his own words, "whether that would not be taken to be a sufficient deposit, which could be taken, upon looking at the instruments, to amount to evidence that the estate was meant to be a security "

Deposit may
be of part of
deeds

The equitable mortgagee by deposit of part of the deeds was held entitled to a charge on the property where the rest of the deeds remained in the possession of depositor's solicitors (u); and the deposit was supported, though the absent deed was the conveyance (x), and where evidence in writing existed that the security was intended upon the whole (y). The deposit by a landlord of a lease to a creditor as a security, was held equivalent to an equitable mortgage of the fee (z); and if part of the title deeds be deposited with one creditor and part with

(q) *Ashton v Dalton*, 2 Coll 565

(r) *Bulfin v Dunne*, 11 Ir Ch R 198

(s) *Exp Pearse*, 1 Buck 525, *Exp Arkwright*, 3 M D & De G 129 See *Lacon v Allen*, 3 Drew 579, *Jones v Williams*, 24 Beav 47

(t) 11 Ves 398

(u) *Exp Chryppendale*, 2 M & A 299 See *Ashton v Dalton*, 2 Coll 565

(x) *Roberts v Croft*, 2 De G & J 1 See *Thorp v Holdsworth*, L R 7 Eq 147, *Exp Edwards*, 1 Deac 611

(y) *Exp Pott*, 7 Jur 159

(z) *Richards v Bonnett*, 3 Esp 102.

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- another, each depositee may have a good security (*a*),¹ there be evidence of a contrary intention (*b*)
- Deposit of receipt for purchase-money An equitable mortgage may be created by the deposit of receipt for purchase-money, containing the terms of the agreement for sale, if there be no title deeds or conveyance in the depositor's possession (*c*)
- Deposit of copies But a deposit of an attested copy of a deed is not sufficient to create a valid equitable charge (*d*)
- Removal of deposited deeds Where a debtor deposited title deeds as security, but afterwards fraudulently removed some of them, and the deeds removed could not be identified, it was held that the creditor had a lien on all title deeds belonging to the debtor (*e*)
- Memorandum incorrectly referring to deeds If the memorandum accompanying a deposit of deeds refers to deeds not deposited, and other deeds are deposited, the security will attach to the deeds actually deposited (*f*) If the memorandum specifies only some of the deeds which are actually deposited, the security will attach to all the deeds deposited (*g*)
- Deposit of land certificate under Land Registry Act, 1862, An equitable mortgage of land, the title to which is registered under the Land Registry Act, 1862 (*h*), cannot be created by a deposit of title deeds; but a deposit of the land certificate has the same effect, for the purpose of creating a lien upon the estate and interest of the depositor, as a deposit of the title deeds would have had before the passing of the Act
- under Land Transfer Act, 1875 Under the Land Transfer Act, 1875 (*i*), subject to any registered estates, charges, or rights, the deposit of the land certificate in the case of freehold land, and of the office copy of the registered lease in the case of leasehold land, shall, for the purpose of creating a lien on the land to which such certificate or lease relates, be deemed equivalent to a deposit of the title deeds of the land
- Conflict of laws When the *lex loci rei sitæ* does not forbid, and the parties do not contract with reference to any other particular law, and the general law of the place is English, an equitable lien will be created upon land by a deposit of title deeds (*h*)

(*a*) *Roberts v Croft*, 24 Beav. 223, affirmed 2 De G. & J. 1

(*b*) *Exp Pearce*, 1 Buck 525

(*c*) *Goodwin v Waghon*, 4 L. J. N. S. Ch. 172

(*d*) *Exp Broadbent*, 1 M. & A. 635

(*e*) *Mason v Morley*, 34 Beav. 475

(*f*) *Exp Powell*, 6 Jur 490

(*g*) *Ferris v Mullins*, 2 Sm. & G. 378

(*h*) 25 & 26 Vict. c. 53, ss. 63, 73

(*i*) 38 & 39 Vict. c. 87, s. 81

(*k*) *Vanden v Luckpathy*, 9 Mo. I. A. 303 See *Exp Hoithausen, Re Schenckler*, L. R. 9 Ch. A. 722

What Property is charged by a Deposit of Deeds — A

CHAPTER VII

of title deeds creates an equitable mortgage on all the property comprised in them, and all the interest of the mortgage therein, unless the contrary intention be clearly shown (*l*)
 An inference of intention may be drawn that part only of the property comprised in the deposited deeds should be subject to the security (*m*), as where the memorandum specified that part only; but other written evidence may be looked at to show the measure of the security (*n*)

All property comprised in deeds is charged by deposit
 Evidence of contrary intention

Property not included in the documents deposited will not be included against strangers, merely from a false statement of the mortgagor that it was included (*o*)

The deposit will affect only the beneficial interest of the debtor, but will include accretions to, or substitutions for, the property affected (*p*)

Accretions

If the title deeds of the house engaged in trade are deposited to secure a debt, and the premises are sold together with the goodwill of the business, the equitable mortgagee will be entitled to the whole of the purchase-money (*q*)

Goodwill

A renewed lease is subject to the same equitable mortgage that affected the former lease (*r*), exactly as in the case of a legal mortgage.

Renewed lease

When an agreement for a lease is deposited by way of security, and a lease is afterwards granted to the depositor upon different terms, it seems that the deposit will not be affected so far as regards the particulars to which the deposit extends (*s*)

Lease granted pursuant to agreement

An owner of a limited estate has, of course, no right to charge the lands, by deposit of deeds or otherwise, beyond the extent of his estate. And accordingly, if the deeds deposited show him to be a limited owner, or if the deposit has notice of the fact *abunde*, it is clear that the limited estate only is charged. But it seems that parol evidence of the assent of the remainderman to a deposit of deeds by a tenant for life would be admissible to charge the inheritance (*t*)

Deposit by limited owner

(*l*) *Ashton v Dalton*, 2 Coll 565, *Exp Bisdee*, 1 M D & De G 333

(*m*) *Wylde v. Radford*, 9 Jur N S 1169, *Exp Robinson*, 1 D & C 119, *Exp Leathes*, 3 D & C 112, *Exp Heathcote*, 2 M D & De G. 711

(*n*) *Exp Glyn, Re Medley*, 1 M D & De G 29, *Exp. Hunt*, 1 M D & De G 139

(*o*) *Jones v Williams*, 24 Beav 47

(*p*) *Exp Bisdee*, 1 M D & De G 333, *Exp Farley*, 1 M D & De G. 683

(*q*) *Chasum v Dewes*, 5 Russ 29, *Pile v Pile*, 3 Ch D 42, C A

(*r*) And see *post*, p 165

(*s*) *Exp Reid*, 17 L J Bky 19

(*t*) *Williams v Medlicott*, 6 Pn 495

MORTGAGE BY DEPOSIT.

ER VII. A legal tenant for life of freeholds is entitled to the custody, and equitably for the title deeds, and the Court will not interfere as between it and the remainderman, except where there is danger to the possession safety of the deeds if left in the hands of the tenant for life, or where the Court requires the deeds for the purpose of carrying out trusts relating to the property (u). In consequence of the custody, the tenant for life is enabled to mortgage the land or deposit the title deeds as apparent owner of the fee, and the bona fide mortgagee has such defence as a plea of purchase for value without notice is capable of affording (z).

and and A deposit by husband and wife of the title deeds of the wife was held not to operate as an appointment by the wife under a settlement (y).

But where a man deposited his wife's mortgage (over which he had, *jure mariti*, a power of disposition) to secure a debt of his own, the security was upheld, as against the wife surviving, as an alienation *pro tanto* (z).

or ee A deposit with memorandum of charge by an heir or devisee is an alienation *pro tanto*, which will, to the extent of the moneys secured, defeat the rights of the creditors of the ancestor or testator against the mortgaged property, as assets under the statute 3 & 4 Will IV. c. 104 (a).

executor An executor may deposit without his co-executor joining to raise money for the purpose of administration (b).

on having interest. If a person has no interest in deeds deposited with him, he cannot, of course, confer any interest in the property comprised therein by delivering them to a third party by way of security or otherwise (c).

trustee Where a trustee deposits the trust deeds, upon which the trust is apparent, with his bankers, the trust is prior to the lien (d): but the *cestui que trust* are preferred, even if there is no notice (e).

fraudulent deposit of deeds If the deeds of one client are by the act of a solicitor deposited with another client fraudulently, the onus falls on the mortgagee

(u) *Leathes v Leathes*, 5 Ch D 221. And see *Taylor v Sparrow*, 4 Griff 706, in which *Warren v Rudall*, 1 J & H 1, and *Pynsent v Pynsent*, 3 Atk. 571, are commented upon.

(x) *Walwyn v Lee*, 9 Ves 24. See *post*, pp. 1303 *et seq*.

(y) *Lewthwaite v Clarkson*, 2 Y & C 372.

(z) *Bates v Dandy*, 2 Atk 207.

(a) *British Mutual Investment Co v Smart*, L R 10 Ch A 567.

(b) *Exp Sheffield Union Banking Co, Re Carter*, 13 L T N S 477.

(c) *Jackson v Butler*, 2 Atk. 306. See *Bell v Taylor*, 8 Sim 216.

(d) *Welchman v Coventry Union Bk*, 8 W R 729.

(e) *Stachhouse v Countess of Jersey*, 1 J & H 721.

to prove that the solicitor was the agent of the mortgagor (*f*); and when a solicitor permits his client to deposit deeds, he cannot set up a first mortgage of which he was assignee (*g*). CHAPTER VII

A son fraudulently, and without the father's knowledge, deposited in 1859 title deeds belonging to the father to secure an advance, the depositee having no notice of the fraud. In 1882 the father claimed delivery up of the deeds. The depositee refused and pleaded the Statute of Limitations; but it was held that the statute did not begin to run until the refusal (*h*). Statute of Limitations

vii.—To whom the Deposit should be made—The deposit may be made either to the creditor himself or to some third person over whom the depositor has no control (*i*). To whom deposit may be made

But it will not be effectual if made to the wife of the depositor, nor, *à fortiori*, if permitted to be retained by the debtor (*k*), unless he gives a memorandum in writing to the creditor that he holds the deeds for the creditor as security for the debt (*l*). Retainer of deeds by debtor

And a written memorandum enclosing the bonds kept by the depositor, and not communicated to the creditor, is not sufficient, at all events against the trustee in bankruptcy (*m*), although it may amount to a declaration of trust (*n*).

But where the memorandum and documents were in the possession of the debtor, a secretary to a company being the creditor, the deposit was established (*o*).

The equitable deposit in the hands of one person will not be extended to an advance made by another person, unless the person holding the deeds is a mere trustee and has made no advance (*p*). Advance by third person

viii.—General Remarks—The question as to the necessity of registering a memorandum of charge accompanying a deposit of title deeds relating to land in Middlesex or Yorkshire will be considered later (*q*). Registration

(*f*) *Wall v Cockerell*, 10 H L C 229. See *Exp Hume*, 3 De G & J 464, *Ogilvie v Jeaffreson*, 2 Giff 353.

(*g*) *Doule v Saunders*, 2 H & M 242.

(*h*) *Spackman v Foster*, 31 W R 548.

(*i*) *Lloyd v Attwood*, 3 De G & J 614.

(*k*) *Exp Coming*, 9 Ves 115.

(*l*) *Baynard v Woolley*, 20 Beav 583.

(*m*) *Wilson v Balfour*, 2 Camp 579. And see *Exp Combe*, 9 Ves 117, *Adams v Glaxton*, 6 Ves 226.

(*n*) *Re Bankhead's Trusts*, 2 K & J. 560.

(*o*) *Ferris v Mullins*, 2 Sm & G 278.

(*p*) *Exp Whitbread*, 19 Ves 212, 1 Rose, 299, *Re Henry*, *Exp Crossfield*, 3 Ir Eq R 67.

(*q*) See *post*, pp 1246 *et seq*.

CHAPTER VII

Priority

The question of the possession of deeds as affecting the priorities *inter se* of incumbrancers will also be more fully considered in a subsequent chapter (*r*)

On a review of the decided cases establishing this mode of mortgage security, it is perhaps to be regretted that the old law was not adhered to, and the principle on which the Statute of Frauds was founded more respected. For although equity, by declaring the deposit itself to be evidence of an agreement executed, has contrived to evade the strict and literal wording of the statute, yet it is manifest that the door has been in some degree open to fraud and perjury; nor does a creditor seem to deserve much favour who will not be at the trouble of a few lines in writing (*s*) if he is desirous to have a charge on his debtor's estate. If the debtor denies that the deposit was intended to cover future advances, as in *Exp Mountfort* (*t*), or if he insist that the deeds were not delivered by way of deposit, but with a different intent, resort must, in many cases, be had to parol evidence; and, as remarked by Lord Eldon (*t*), "the mischief of all these cases is, that the Court is deciding upon parol evidence with regard to an interest in land within the Statute of Frauds."

The preceding remarks strongly demonstrate the inexpediency of taking a security by deposit, unless accompanied by a memorandum stating the nature and terms of the mortgage contract, as likely to lead to dispute and litigation. This species of security ought never to be accepted, except, perhaps, in the case of small temporary loans. One advantage attending the taking of a memorandum in writing is that in case the mortgagor becomes bankrupt, and the depositee applies to the Court for an order for sale, he is allowed his costs out of the estate, but not if he has a deposit of deeds without any writing signed by the mortgagor (*u*).

(*r*) See Chap LVIII, *post*, pp 1340
et seq

(*s*) *Exp Whitbread*, 19 Ves 209

(*t*) *Exp Mountfort*, 14 Ves 606

(*u*) *Exp Brightens*, 1 Swanst 3,
Exp Silas, Buck 349, *Exp Trew*, 3
Madd 372, *Exp Robinson*, 1 D & C

119, *Exp Thorpe*, 3 M & A 441,
Exp Barclay, 5 De G M & G 403,
Exp Dingwall, 6 L T N S 915 See
Exp Pigeon, 2 D & C 118, *Exp*
Emmetton, 3 D & C 654, *Exp Rey-*
nolds, 4 D & C 278 See also *Exp*
Reid, 1 M & McA. 14

CHAPTER VIII

OF INSTRUMENTS COLLATERAL OR ANCILLARY TO MORTGAGES.

i.—Of Bonds collateral to Mortgages—It was formerly a usual practice to require borrowers to give bonds as collateral securities for the payment of the principal and interest contemporaneously secured by mortgage. But since the passing of the statute 1 Will IV c. 47, whereby actions on covenants may be maintained against devisees of the covenantor, collateral bonds add little or nothing to the security derived from the covenants for payment usually inserted in the mortgage. For this reason such bonds have very generally fallen into disuse as merely causing unnecessary expense.

Bonds collateral to mortgages now unusual

Inasmuch, however, as bonds given by way of collateral security for the payment of mortgage-moneys are still occasionally met with in practice, it may be useful to state briefly some of the points which have been decided in regard to such instruments.

Although it is a general rule, both at law and in equity, that a bond debt shall not carry interest beyond the penalty (a), yet the rule will not apply where the repayment of a principal sum, with all interest that may accrue due thereon, is secured by a mortgage and also by a bond for the same sum, as the mortgagee's right to recover all interest due is not to be prejudiced by the bond (b); and this principle will apply even although the mortgage is given by a surety and subsequent to the bond, unless the mortgage is made a security only for the bond debt and the interest to become due on the bond (c).

Interest beyond penalty

The rule that interest on a bond debt is not allowed beyond the penalty of the bond prevails in the administration of assets, except under special circumstances (d).

(a) *Bromley v Gooders*, 1 Atk 80, *White v Sealy*, Doug 49, *Tow v Lord Winterton*, 3 Bro C C 489, *Knight v. Maclean*, 3 Bro C C 496, 498, *Mackworth v Thomas*, 5 Ves 329, *Clarke v. Seton*, 6 Ves 411, *Wilde v Clarkson*, 6 T R 303.

(b) *Clarke v Lord Abingdon*, 17 Ves 106

(c) See *Hughes v Wynne*, 1 My & K 20. And see *Lloyd v Hatchett*, 2 Anst 525. And see *Clowes v. Waters*, 16 Jur 632

(d) *Atkinson v. Atkinson*, 1 Ba & Be.

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It is said that interest will be allowed beyond the penalty where a mortgagee has added a bond debt to his mortgage (e), on the principle that a mortgagor seeking the aid of equity to enforce his right of redemption, must do complete equity by payment of all interest due though in excess of the penalty of the bond (f).

Forfeiture by non-payment of mortgage debt

It was held in an early case, that a bond by a mortgagor for performance of the covenants and conditions in the mortgage deed would be forfeited by a breach of the proviso in the deed for the payment of the money (g)

Relief from forfeiture in equity

The penalty of a bond for payment of money is generally double the amount of the principal sum to be thereby secured. If the money be not paid at the time limited in the condition, the bond becomes forfeited, or absolute at law. On the forfeiture of a bond the whole penalty was formerly recoverable at law (h), but the Courts of Equity interfered and would not permit a man to take more than in conscience he ought to take, namely, his principal, interest and costs (i). Wherever the payment of a smaller sum is secured by a larger, the Court will treat the larger sum as a penalty, and not as liquidated damages, and will relieve accordingly (k).

Non-payment of instalment

Where a bond is given to secure a principal sum by instalments, and default is made in payment of any one of the instalments at the time appointed, as the condition is broken, the obligee may bring an action, and obtain judgment for the whole penalty; though the Court would prevent his taking execution for more than is due (l).

Warrants of attorney formerly taken as securities collateral to mortgages

ii.—Of Warrants of Attorney.—Warrants of attorney to confess judgment sometimes accompanied mortgages by way of collateral security, so as to enable the mortgagee to enter up judgment and issue execution. It was never the practice,

238, *Duwall v Terrey*, Show P C 15, *Grant v Grant*, 3 Russ 607. And see the same principle in *Bond v. Hopkins*, 1 Sch & L 413, 434, *Pulteney v Warren*, 6 Ves 73—79.

(e) *Peers v Baldwin*, 2 Eq Ca Abr 611. As to adding bond debts by mortgagee on tacking accounts, see *post*, pp 1151, 1152.

(f) See *Godfrey v Watson*, 3 Atk 517 (tacking judgment). But see *contra*, *Powell on Mortgages* (6th ed.), 355.

(g) *Tooms v Chandler*, 2 Lev 116, *contra*, *Briscoe v King*, Cro Jac 281, *nom* *Bristoe v Knappe*, Yelv 206.

(h) But see 4 & 5 Anne, c 16, ss 12, 13.

(i) *Lord Lonsdale v Church*, 2 T R 388, *Wilde v Clarkson*, 6 T R 303.

(k) *Aylet v Dodd*, 2 Atk 239, *Davies v Penton*, 6 B & Cr. 223.

(l) *Darby v Wilkins*, 2 Stra 957, *Masfen v Touchet*, 2 W. Bl 706, *Talbot v Hodson*, 7 Taunt 251.

except in particular cases, and as a matter of special contract, to take a warrant of attorney to enter up judgment against a mortgagor

Warrants of attorney were considered particularly appropriate in cases of annuities, as not only affording the grantee a speedy and effectual means of compelling payment by entering up and confessing judgment and taking out execution for the arrears, but also as giving to the grantor, or any person claiming under him, a right at any time to apply to the original jurisdiction of the Court to vacate the warrant of attorney or set aside the judgment, instead of having recourse to the more circuitous mode of proceeding provided by the Annuity Act (*m*).

The simplification of procedure in actions for debt generally has caused warrants of attorney by way of collateral security to mortgages to be rarely met with in modern practice

Warrants of attorney now unusual in mortgage transactions
When a warrant of attorney may be advisable.

A warrant of attorney to confess judgment, like a power of distress for securing the interest on a mortgage, is more effectual when the mortgagor himself is in occupation than when the property is held by a tenant, as, in the latter case, the only effect of the mortgagee proceeding under the warrant would be to enable him to get into possession of the rents, which he might do by a mere notice to the tenant (*n*). It may be, however, that the restrictions on powers of distress and attornment imposed by the Bills of Sale Acts (*o*) may have the effect of bringing warrants of attorney again into use where the mortgagor is himself in occupation (*p*)

Inasmuch as the statute 13 Edw I c 18, whereby the remedy by writ of *elegit* was provided for creditors, extended to the case of a debt acknowledged in the king's court, a mode of security was suggested, which gave the creditor an immediate hold upon the land, and at the same time saved him the expense of actual process to obtain judgment. This was by warrant of attorney, authorizing certain attorneys to appear for the debtor and confess the debt in a Court of record, whereupon judgment might be forthwith entered up, and a writ of execution *instantly* sued out. Between a judgment so obtained and a judgment obtained in an actual action, Lord Kenyon, in *Doe v Carter* (*q*), said he

Nature and effect of warrants of attorney

(*m*) Barton, Conv vol vi p 16, n

(*n*) Byth & Jarm. Conv (4th ed), vol iii p 986

(*o*) See *post*, p 664

(*p*) Key & Elphinstone, Conv (5th ed), vol ii p 51
(*q*) 8 T R 61.

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Effect of
defeasance

saw no difference (*r*), since the object of the former was merely to shorten the process and to lessen the expense of the proceeding.

The defeasance of a warrant of attorney that on non-payment at a certain day execution may issue, is not a contract, but merely a description of the object of the security, and of the means by which, in case of default, the creditor may enforce payment (*s*). The proper mode of recovering debts so secured is by entering up judgment in pursuance thereof, and not by action on an implied contract to pay the debt (*t*).

Where a defeasance to a warrant of attorney provides that in default of the payment of an annuity secured thereby, the grantee may sue out execution or executions thereon, this will warrant successive executions (*u*)

Continuing
security.

A warrant of attorney, with a defeasance stating it to be given as a security for a sum named, and interest thereon, will be construed as a continuing security, and not merely for money then due, in the absence of anything on the face of the warrant or defeasance to show such an intention (*x*)

Warrant of
attorney not
a breach of
covenant not
to assign
lease

Where there is a covenant against assignment in a lease, or any estate is to be forfeited upon any alienation or charge, a warrant of attorney is not a breach of forfeiture, although the lease or other interest is taken in execution under it (*y*); and that although, by the defeasance, it was intended that the judgment to be entered up under it was to be registered, and so become an equitable charge (*z*); unless it be given for the express purpose of enabling the lease or other interest to be taken in execution (*a*)

The same principle is acted on in determining whether a warrant of attorney is void, as being a charge on a benefice (*b*)

Warrant of
attorney
whether coun-
termendable.

A warrant of attorney to enter up judgment, or to sell lands, by way of a security for a debt, being an authority coupled with an interest, is not countermandable (*c*) And the warrant, in

(*r*) *Doe v Jones*, 10 B & Cr 468
(*s*) *Cook v Fowler*, L R 7 H L 35
(*t*) *Sherborn v Tollenmache*, 13 O B
N S 742
(*u*) *Cuthbert v. Cole*, 1 O B 278.
(*x*) *Woolley v Jennings*, 5 B & Cr
165
(*y*) *Doe d Mitchinson v Carter*, 8
T R. 57, *Arison v Holmes*, 1 J &
H 530, *Doe d Norfolk (Duke of)* v
Hawke, 2 East, 481 See *South Western*
Loan, & Co. v Robertson, 8 Q. B. D.

17
(*z*) *Croft v. Lumley*, 6 H L O
672
(*a*) *Doe d Mitchinson v Carter*, 8
T R 300
(*b*) *Post*, p 440
(*c*) *Oades v Woodward*, 2 Ld Raym
150, 1 Salk 87, *Walsh v Whitcombe*,
2 Esp 565, *Gausson v Morton*, 10 B
& Cr 731 And see *Hodgson v Ander-*
son, 3 B & Cr 842, 851, *Spooner v.*
Sandilands, 1 Y. & C O C 390

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the case of a mortgage transaction, being for valuable consideration, the power to enter up judgment conferred by the instrument may now be expressed to be irrevocable, so as not to be revoked by, or prejudicially affected by, or by notice of anything done by the donor of the power, or his marriage, death, lunacy, unsoundness of mind, or bankruptcy (*d*).

The death of the plaintiff is not a countermand of the warrant if the instrument authorizes his executors to enter up judgment (*e*). Death of plaintiff

The death of the defendant (unless the power is expressed to be irrevocable) is a countermand, and an agreement that judgment may be entered up notwithstanding his death was held to be void (*f*). But it is sufficient to show that the defendant was living within a reasonable time previously to the application (*g*). Death of defendant.

So, upon a warrant of attorney given by two, judgment cannot be entered up against the survivor (*h*). But *secus*, where one of two joint plaintiffs dies, for then the survivor may enter up judgment (*i*). And the Court will not enter up judgment *nunc pro tunc* as of a term prior to the death of an insolvent upon a warrant of attorney given by such insolvent before his discharge, although the assets do not fall in until after his death (*k*).

It is not an objection to signing judgment on a warrant of attorney that the defendant has, since the execution, become insane (*l*). But the Court will not allow judgment to be entered up against a party who, having given a warrant of attorney to confess judgment for securing the payment of a sum, or the transfer of stock, *on demand*, has become insane (*m*). Insanity of defendant

A warrant of attorney given to secure a debt, with an agreement that judgment should not be entered up till the debtor should become bankrupt or insolvent, means a general inability to pay debts (*n*). Meaning of insolvency

It seems rather a nice question, whether a creditor is warranted in signing a judgment on a warrant of attorney or cognovit Costs.

(*d*) 45 & 46 Vict c 39, s 8

(*e*) *Coles v Haden*, Barnes, 44, *Henshall v Matthew*, 7 Bing 337, *Blackburne v Godrich*, 9 Dowl 337, *Harden v Forsyth*, 1 Q B 177

(*f*) *Heath v Brindley*, 2 A. & E. 365

(*g*) *Jordan v Farr*, 2 A. & E 437

(*h*) *Gee v Lane*, 15 East, 592.

(*i*) *Fendall v May*, 2 M & S 76, *Spong v Tucker*, 1 Y & J 206

(*k*) *Harden v Forsyth*, 1 Q B 177

(*l*) *Piggott v Kilhak*, 4 Dowl 287

(*m*) *Capper v Dando*, 2 A. & E 458

(*n*) *Briddlecombe v Bond*, 4 A. & E. 332, *Re Muggersidge*, Johns 625.

CHAPTER VIII.

Who may give
a warrant of
attorney

given to secure a debt and *costs*, without first taxing those costs (o).

A warrant of attorney cannot be given by an infant (p), and if he give a joint warrant of attorney, the judgment will be set aside as to him (q), nor can it be given by a partner, to bind his co-partners (r), nor by an executor, to bind his co-executors (s).

Before the late Married Women's Property Acts, if a *feme sole* signed a warrant of attorney, the Court or a judge, after her marriage, allowed judgment to be entered up against the husband and wife (t). The judgment upon such warrant of attorney would, in regard to the liability of the husband, be subject to the late Acts (u). If a warrant of attorney is given to a *feme sole*, her subsequent marriage is not a revocation of it; and judgment will not be entered up in the name of the husband and wife (x); as where a warrant of attorney was given by W to D and S, and W. and S. afterwards inter-married (y).

Time from
which a war-
rant speaks.

A warrant of attorney speaks from the time of its execution, and not from the day of its date, and therefore such an instrument, dated the 24th of February, 1847, but executed the 20th of March following, defeasanced on payment of the debt on the 20th of March *then next*, was held to be a security for payment on the 20th of March, 1848 (z).

Formalities
of execution

By the Debtors Act, 1869 (a), it is provided that no warrant of attorney to confess judgment in any personal action, or *cognovit actionem* given by any person, shall be of any force, unless there shall be present some attorney of one of the superior Courts on behalf of such person, expressly named by him, and

(o) *Booth v Lady Hyde Parker*, 3 M. & W 54

(p) *Saunderson v Marr*, 1 H Bl 75, *Wood v Heath*, 1 Chit G P 708, n, *Oliver v Woodroffe*, 4 M & W 650, *Storton v Tomlins*, 10 Moore, 172, *Weaver v Stokes*, 1 M. & W 203

(q) *Ashlin v Langton*, 4 Mo & Sc 719, *Mottoux v St Aubyn*, 2 W Bl 1133

(r) *Brutton v Bunton*, 1 Chit G P 707; *Hunter v Parker*, 7 M. & W. 322

(s) *Elwell v Quash*, 1 Str 20

(t) *Staples v Purser*, 2 Dowl 764, *Pocock v Fry*, 8 Dowl. 126, *Anon*, 1

Show 89, *Hartford v Mattingly*, 2 Chit G P 117, *Hugginbottom v Hugginbottom*, 8 Dowl 126

(u) 33 & 34 Vict c 93, s 12, 37 & 38 Vict c 50, 45 & 46 Vict c 75

(x) *Anon*, 1 Salk 117 See *Dolling v White*, 22 L J Q B 327

(y) *Marden v Lee*, 3 Burr 1469, *Metcalf v Boote*, 8 D & Ry 46, *Anon*, 7 Mod 53

(z) *Br own v Bunton*, 17 L J Q B 47.

(a) 32 & 33 Vict c 62, s 24, re-enacting 1 & 2 Vict c 110, s 9

attending at his request to inform him of the nature and effect of such warrant or cognovit before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be the attorney for the person executing, and state that he subscribes as such attorney "Solicitor" is now substituted for "attorney" (b)

A warrant of attorney, to confess judgment or *cognovit actionem*, not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same (c)

Warrant of attorney not formally executed void

The attestation, though not necessarily in the words of the statute, must show, by necessary implication, that the statutory requirements have been fulfilled (d)

The solicitor for the plaintiff cannot act for the defendant (e); nor the London agent of, nor a solicitor acting as the clerk of, the plaintiff's solicitor (f), nor can the same solicitor act for both parties (g)

Although the solicitor must be "expressly named" by the defendant, yet the appointment will not be invalid if the solicitor was suggested by another person, or even introduced by the creditor himself, or even paid by the creditor (h), so long as the solicitor is *bonâ fide* appointed by the defendant (i)

When the solicitor has been really named by the defendant, he is there to inform him of the nature and effect of the instrument, if he requires it, the solicitor is not bound to read the instrument over to him, unless he desires him to do so (k). Nor can the debtor complain, in the absence of fraud, that he did not understand the nature and effect of the instrument in con-

(b) Judicature Act, 1873, s. 87

(c) 32 & 33 Vict. c. 62, s. 25

(d) *Pocock v. Packer*, 18 Q. B. 789, *Holt v. Kershaw*, 5 D. & L. 419, *Lewis v. Lord Kensington*, 15 L. J. C. P. 100, 2 C. B. 463, *Phillips v. Gibbs*, 16 M. & W. 208. See further as to what amounts to proper attestation, *Ledgard v. Thompson*, 11 M. & W. 40, *Hibbert v. Barton*, 10 M. & W. 678, *Elkington v. Holland*, 9 M. & W. 659, *Potter v. Nicholson*, 8 M. & W. 294, *Olver v. Woods*, 4 M. & W. 650, *Everard v. Poppleton*, 5 Q. B. 181, *Gay v. Hall*, 5 D. & L. 422, *Levinson v. Syer*, 15 Jur. 1011

(e) *Mason v. Kiddle*, 5 M. & W. 513

(f) *Pryor v. Swayne*, 2 D. & L. 37, *Durrant v. Blurton*, 9 Dowl. 1015

(g) *Cooper v. Grant*, 12 C. B. 154, *Rising v. Dolphin*, 8 Dowl. 309, *Sanderson v. Westley*, 8 Dowl. 412, *Hurst v. Hannah*, 17 Q. B. 383

(h) *Hargh v. Frost*, 7 Dowl. 743, *Hale v. Dale*, 8 Dowl. 599, *Pease v. Wells*, 8 Dowl. 626, *Barnes v. Pendrey*, 7 Dowl. 747, *Bligh v. Brewer*, 3 Dowl. 266, *Rice v. Linstead*, 7 Dowl. 153, *Taylor v. Nicholls*, 6 M. & W. 91, *Joel v. Ducker*, 5 D. & L. 1

(i) *Walton v. Chandler*, 1 C. B. 306, *Levinson v. Syer*, 21 L. J. Q. B. 16

(k) *Taylor v. Nicholls*, *sup.*

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sequence of his own omission to request the solicitor to give him explanation (*l*)

The attestation need not state that the solicitor was expressly named by the debtor, or that he attended at his request (*m*)

Filing of
warrants of
attorney.

Where such warrant of attorney to confess judgment, or cognovit, or a true copy thereof, is not filed with the officer acting as clerk of the judgments in the Queen's Bench Division within twenty-one days next after execution, as required by 3 Geo IV. c 39 (which makes it necessary to file an affidavit of the time of execution, as prescribed by that statute (*n*)), it shall be deemed fraudulent, and shall be void; and if any such warrant of attorney, or cognovit, so filed, was given subject to any defeasance or condition, such defeasance or condition shall be written upon the same paper or parchment with the warrant or cognovit before the filing thereof; otherwise, the warrant or cognovit shall be void (*o*)

Where a judge's order made by consent is given by a defendant in a personal action, whereby the plaintiff is authorized forthwith, or at any future time, to sign or enter up judgment, or to issue or take out execution, whether such order is made subject to any defeasance or condition, or not, the order, if the action is in the Queen's Bench Division, and a true copy of the order, if the action is in any other Division, shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the judgments in the Queen's Bench Division within twenty-one days after the making of the order, otherwise the order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void (*p*), and the provisions of 3 Geo IV c 39 (ss 5, 8), and of 6 & 7 Vict c 66, as to the filing warrants of attorney and cognovits with the clerk of the judgments, and for the making entries by such clerk, and search in relation thereto, and for entering satisfaction thereon, and for fees for search and filing, and taking office copies, extend and apply to every such judge's order (*q*).

Non-compliance with the statutory requirement as to filing

(*l*) See cases cited *sup*, p 73, note (*h*)
(*m*) *Oliver v Woodroffe*, 4 M & W.
650, *Gay v Hall*, 5 D & L 422.
(*n*) *Acraman v Herniman*, 16 Q B
N. S 998

(*o*) The Debtors Act, 1869 (32 & 33
Vict c 62), s. 26
(*p*) 32 & 33 Vict c. 62, s 27
(*q*) *Ibid.* s 28

the judge's order within twenty-one days only renders the order and judgment void as against creditors of the defendant, not as against the defendant himself (r).

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The Acts apply to warrants of attorney, whether executed in this, or in a foreign, country (s); and it seems that, if judgment be signed on a warrant of attorney which is not made in compliance with the statutes, the defect cannot be waived (t), and the statutes do not apply where the defendant is himself an attorney (u).

By another Act (x), an additional book or index is directed to be provided, in which only the names, additions, and descriptions of the respective defendants, or persons giving the warrants or cognovits, are entered, and which may be searched on payment of the additional fee mentioned in the Act.

Index of warrants of attorney

Warrants of attorney to confess judgments in Ireland are subjected to nearly the same regulations (y).

Ireland

The judgment must be signed in the way authorized by the warrant. It is always final, and signed in like manner as a final judgment by confession or default in an adverse suit (z).

Signing of judgment

Judgment on a cognovit, though given before appearance, may be signed after more than the lapse of a year without a declaration, and without motion or order of a judge (a). Nor does it apply when there is an agreement to dispense with these forms (b). And it seems that, under a warrant of attorney to confess judgment, judgment may be signed and execution issued without an appearance being entered on the part of the defendant, or, at most, such an omission is a mere irregularity, which may be waived by laches (c). So, signing judgment on a warrant of attorney for a sum larger than that mentioned in the warrant, is a mere irregularity, which may be waived in like manner (d).

Final judgment is not signed on the officer of the Court making the postea, but on his completing the taxation of costs (e).

Final judgment.

(r) *Gowan v Wright*, 18 Q. B. D. 201, C. A. See *Re Russell, Ex p Guest*, W. N. (1888) 198, C. A.

(s) *Davis v Trevelyan*, 2 D. & L. 743.

(t) *Gripper v Bristow*, 6 M. & W. 807.

(u) *Downes v Garbett*, 2 Dowl. N. S. 939, *Chipp v Harris*, 5 M. & W. 430.

(x) 6 & 7 Vict. c. 66.

(y) 3 & 4 Vict. c. 105, ss. 12—18, inclusive.

(z) Tidd, 9th ed. p. 556, *Burham v*

Tucker, 8 Sc. 669, *Kemp v Matthew*, 8 Sc. 399, *Charlesworth v Ellis*, 7 Q. B. 678.

(a) *Thompson v Langridge*, 1 Exch. 351.

(b) See *Tripp v Stanley*, 17 L. J. Q. B. 19.

(c) *Charlesworth v Ellis*, 7 Q. B. 678, *Burham v Tucker*, 8 Sc. 669.

(d) *Stopford v Fitzgerald*, 16 L. J. Q. B. 310.

(e) *Builer v Bulkeney*, 1 Bing. 233, *Price v Derry*, 4 Q. B. 635. But see

CHAPTER VIII

Execution.

Memorandum
of satisfaction.

Execution on warrants of attorney is the same as in ordinary cases (*f*)

Power is given to any of the judges of the Court, in which the warrant of attorney or cognovit is given, to order a memorandum of satisfaction to be written upon such warrant, cognovit, or copy thereof, respectively as aforesaid, if it shall appear that the debt, for which the warrant or cognovit was given, has been satisfied or discharged (*g*)

Where a judgment was entered up on a warrant of attorney for 1,800*l* to secure an annuity, and the judgment creditor received more than the 1,800*l*, the Court ordered satisfaction to be entered up as of the date on which a later judgment was entered up, and directed sums, received by the first judgment creditor since that time, to be paid to the second judgment creditor, but not any of the sums received prior to the signing of the second judgment (*h*)

Warrant of
attorney to
secure interest
only.

If a warrant of attorney to confess judgment is given by way of collateral security, defeasanced on payment of the interest, after the rate and at the time and in manner recited in a mortgage deed of even date, and the interest is paid up to the day fixed for payment in the mortgage deed, though the principal be still unpaid, the Court will order satisfaction to be entered on the judgment. But the application will be refused if, from the introduction of other words into the defeasance,* there is the least doubt if the security of the judgment is to be so limited (*i*)

Setting aside
warrant

Application to set aside a warrant of attorney collateral to a mortgage can only be made by the party himself, or by his attorney duly authorized by him for that purpose (*l*). But it may be made, though defendant has become bankrupt since his execution of the warrant (*l*)

The provision is for the benefit of the defendant only, and, therefore, a third party who may be prejudiced by a judgment against the debtor cannot raise an objection on the ground of want of proper attestation (*m*).

Fisher v Duadng, 3 Man & Gr 238,
and *Newton v Grand Junction Rail
Co*, 16 M & W 142. And see Archb
(14th ed.) 1323, and cases

(*f*) Archb. (14th ed.) 1323. See as
to bankruptcy, *Young v Bulliter*, 30
L J Q B 153

(*g*) 3 Geo IV c 39, s 8

(*h*) *Cottle v. Warrington*, 5 B & Ad
447.

(*i*) *Atkinson v Jones*, 2 A & E 439
And see *King v Greenhill*, 6 Man &
Gr 59

(*k*) *Leuis v Lord Tankerville*, 11 M
& W 109

(*l*) *Taylor v Nicholls*, 6 M & W
91, *Davis v Trevanion*, 2 D & L 743,
Cocks v Edwards, 2 Dowl N S 55

(*m*) *Chapp v Harris*, 5 M & W
430

A party who introduces an unqualified person, as qualified to attest, cannot afterwards move to set the warrant of attorney aside on that account (*n*). But such warrant may be set aside if the person unqualified is introduced by the opposite party, and acquiesced in by the debtor (*o*).

Nor can a surety recover from the creditor what he has been obliged to pay by way of contribution to his co-surety, who has paid the full sum secured by the warrant, if the warrant be good against the latter (*p*). Surety

The Courts will, under their general jurisdiction, set aside a warrant of attorney to enter up judgment, and the proceedings under it, wherever they appear to have been obtained by fraud or for an illegal consideration (*q*). Thus, an agreement by a bankrupt with one of his creditors to omit the debt in his schedule, and that the cognovit held by the creditor should be suspended and revived after the debtor's discharge, is fraudulent and void, and the Court will set aside judgment entered up, and execution issued, on such cognovit, after the discharge (*r*). And this relief will be given, even on behalf of persons not parties to the warrant, if the execution under it operates as a fraud upon them (*s*). But a warrant of attorney given to secure a sum embezzled will not be set aside, unless it distinctly appears that there was an agreement, either express or necessarily implied, that the plaintiff would abstain from prosecuting for the felony in consideration of the security (*t*). So, a warrant of attorney, given by a lessee in order to elude a covenant not to assign, was held void (*u*). So, if given by way of fraudulent preference, it comes within the Bankrupt Acts (*x*). But such a warrant of attorney cannot be set aside upon affidavits (*y*).

As to what amounts to an attorney, expressly named by the defendant, and acting on his behalf, see *Chipp v Harris*, 5 M & W 430, *Mason v Kiddle*, 5 M & W 513, *Oliver v Woodroffe*, 4 M & W 650, *Gripper v Birstow*, 6 M & W 807, *Sanderson v Westley*, 8 Dowl 412, *Taylor v Nicholls*, 6 M & W 91, *Joel v Drakes*, 5 Dowl & L 1, *Walker v Gardner*, 4 B & Ad 371, *Coz v Cannon*, 4 Bing N C 453, case before the Act

(*n*) *Coz v Cannon*, *sup*, *Jeyes v Booth*, 1 Bos & P 97, *Price v Carter*, 7 Q B 838

(*o*) *Walker v Gardner*, *sup*

(*p*) *Price v Carter*, *sup*
(*q*) *Ward v Lloyd*, 6 Man & Gr 787, see Archb (14th ed) 1311, and cases therein enumerated

(*r*) *Tabiam v Freeman*, 4 B & Ad 887

(*s*) *Martin v Martin*, 3 B & Ad 934

(*t*) *Ward v Lloyd*, 6 Man & Gr 787, *Flower v Sadler*, 10 Q B D 572

(*u*) *Doe d Mitchinson v Carter*, 8 T R 300

(*x*) *Sharpe v Thomas*, 6 Bing. 416, *Newnham v Stevenson*, 20 L J C P 111 See *post*, p 584

(*y*) *Broune v Burton*, 17 L J Q B. 49

CHAPTER IX.

OF SURETYSHIP.

SECTION I

OF THE NATURE OF CONTRACT OF SURETYSHIP.

As to requiring sureties to join in mortgage securities.

i.—Of Sureties in Mortgage Transactions generally.—Where property is mortgaged which is not immediately realizable by the mortgagee in case of default, or which does not of itself yield an immediate income to meet the payment of interest (as, for instance, in the cases of mortgages of policies of life assurance and of reversionary interests), third persons are frequently made parties to the mortgage deed for the purpose of guaranteeing the payment of principal and interest, or of interest alone, and the performance of covenants on the part of the mortgagor necessary for the maintenance of the security

Proviso that surety shall be liable to mortgagee as principal

In order to obviate the risk which the mortgagee runs in such cases of losing his remedies against the surety by reason of subsequent transactions between himself and the mortgagor, who is the principal debtor, it is the usual practice that the surety should enter, jointly and severally with the mortgagor, into all the covenants and stipulations, the performance and observance of which the surety is intended to guarantee, and that a proviso should be inserted in the mortgage deed that, although, as between the mortgagor and the surety, the latter is only a surety, yet that, as between himself and the mortgagee, he shall be deemed a principal debtor, and shall not be released by any subsequent transaction between the mortgagor and mortgagee which would otherwise have that effect (a). The effect of such a proviso is

(a) See *Dev. Conv.* (4th ed.), vol. II. (5th ed.), vol. II pp. 36, 37, 113, *Byth. pt. II p. 603*, *Key & Elph. Conv.*, & *Jarm. Conv.* (4th ed.), vol. III p. 1088.

materially to vary, and, indeed, to a great extent, to exclude, the operation of the rules of law which, in the absence of express contract, regulate the relations of principal and surety, as between them and the creditor.

A proviso to the above effect is inserted in all well-drawn mortgages to which sureties are parties; but cases not unfrequently occur in practice where it appears from the terms of the instrument, or from the circumstances of the case, that one or more of the parties to a mortgage, to a mortgage deed or equitable charge, are merely sureties for the payment of the debt by the principal debtor or debtors. A full and general consideration of the law of principal and surety would be foreign to the scope of the present treatise, but it is proposed in the following pages to consider this subject so far as relates to the liabilities, rights and remedies of sureties in mortgage transactions.

Before the Common Law Procedure Act, 1854 (*b*), if it appeared by the instrument itself that a person was thereby jointly and severally bound with the principal debtor for payment of the debt, parol evidence was inadmissible to prove that he was only a surety (*c*). But in equity, in such a case, the fact was always provable by parol evidence (*d*). So, where in a suit to redeem, the mortgagors alleged that they were sureties only, the mortgagees were compelled to discover their dealings with the alleged principals (*e*).

Where two persons are originally co-debtors, they may, by subsequent arrangement between themselves, without the concurrence or consent of the creditor, make one of them primarily liable for the debt and the other a surety only; and, if notice of such arrangement is given to the creditor he will be bound thereby so as to render him liable to the risk of losing his remedies against the surety by subsequent dealings with the person who has become the sole principal debtor, as by giving time to him (*f*).

Parol evidence as to suretyship

Co-debtors may become principal and surety by subsequent arrangement.

(*b*) 17 & 18 Vict c 125

(*c*) *Lewis v Jones*, 4 B & C 506

(*d*) *Craythorne v Swinburne*, 14 Ves. 160, 170, *Clarke v Henty*, 3 Y & C (Ex.) 187. See *Reynolds v Wheeler*, 10 C B (N S) 561, *Macdonald v Whitfield*, 8 App Cas 733. See now the Jud Act, 1873 (36 & 37 Vict c 66), s 25 (11)

(*e*) *Bradgewater v De Winton*, 33 L J 238

(*f*) *Rouse v Bradford Banking Co*, (1894) 2 Ch. 32, O A, affirmed in D P on other grounds, (1894) A C 586. See *Oakeley v Fasheller*, 4 Cl & F 207, *Overend, Gurney & Co v Oriental Financial Co*, L. R. 7 H L at p 360.

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ii.—Statute of Frauds.—The Statute of Frauds (*g*) enacts that:—

No action on guaranty unless in writing

“No action shall be brought whereby to charge . the defendant upon any special promise to answer for the debt, default, or miscarriage of another person unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized”

Written guarantee shall not be invalid by reason that the consideration does not appear in writing or by necessary inference from a written document

Formerly, if such an undertaking was made by writing not under seal, the consideration must have appeared on the face of the writing (*h*); but now by sect. 3 of the Mercantile Law Amendment Act, 1856 (*i*), it is enacted as follows —

“No special promise to be made by any person after the passing of this Act, to answer for the debt, default or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document”

Parol evidence of consideration, &c

Although parol evidence is admissible to supply the consideration for a guaranty, it cannot be admitted to explain the promise, which must still be in writing (*l*). And if the consideration does not appear on the face of the guaranty, it must be clearly proved by parol evidence (*l*).

If the guaranty is given by a separate instrument, parol evidence is admissible to identify the security in respect of which the promise is made (*m*) or the amount of the debt intended to be guaranteed (*n*), or whether it was intended to be a continuing guaranty to cover further advances (*o*)

SECTION II.

AVOIDANCE OF CONTRACT OF SURETYSHIP.

Contract of suretyship requires

i.—Of Suretyship Contracts void ab initio.—The contract of suretyship requires that all parties to it should mutually exer-

(*g*) 29 Car II c. 3, s 4 See *Mallet v Bateman*, L R 1 C P 163, Ex Ch

(*h*) *Wain v Walters*, 5 East, 10, *Saunders v Wakefield*, 4 B & Al 595

(*i*) 19 & 20 Vict. c 97

(*l*) *Holmes v. Mitchell*, 7 C B N S 361

(*l*) *Glover v Halkett*, 2 H & N 489

(*m*) *Shoetred v Cheek*, 1 A & E 57

(*n*) *Bateman v Phillips*, 15 East, 272 See *Brunton v Dullens*, 1 F & F 450

(*o*) *Grahame v. Grahame*, 19 L R. Ir 249

cise the utmost good faith (*p*) The contract will be void in its inception, unless the fullest information is afforded to the surety as to all material facts affecting his obligations and liabilities, and unless the instrument strictly and literally embodies the terms on which he agreed to assume such obligations and liabilities. So, also, a contract of suretyship, though originally valid, will be avoided by any subsequent transaction between the creditor and the principal debtor which may affect the remedies or liabilities of the surety.

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utmost good
faith between
all parties

Thus, the contract will be void *ab initio* if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and the debtor is misrepresented to the surety, and the misrepresentation be such that, but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the surety's liability might be thereby increased (*q*).

Contract
avoided *ab
initio* by mis-
representa-
tion

So, if a private bargain is entered into between the creditor and principal debtor which may have the effect of varying the responsibility or position of the surety, the withholding the knowledge of that bargain from the surety will vitiate the contract of suretyship. So, where the bargain was that the vendee of goods should pay beyond the market price of goods supplied to him 10s per ton, which was to be applied in payment of an old debt due to the vendor, and the payment for the goods was guaranteed by a third person as follows:—"I will guarantee you in the payment of 200%, value to be delivered to T. in Lightmoore pig iron," but the bargain was not communicated to the surety, it was held, that the concealment was a fraud on the surety, and rendered the guaranty void (*r*).

Concealment
of material
fact will avoid
contract

In order, however, to vitiate the contract, the concealment must be of a fact which materially varies the position of the surety from that which he might naturally expect to hold. So, where a surety guaranteed a cash account opened by the principal debtor to the amount of 750%, and the money was applied in discharge of a debt of that amount owing by the principal debtor to the same creditor, of the existence of which debt the surety was not informed, it was held that the creditor was

Fact con-
cealed must
be material

(*p*) *Daves v London and Provincial Marine Insurance Co*, 8 Ch D 469, C A

(*q*) See *Stone v Comton*, 5 Bing N S 142, 157, *Smith v Bank of Scotland*, 1

Dow 272, *Karlton v Matthews*, 10 Cl & F 934, *Burke v Rogerson*, 14 L T N S 780

(*r*) *Fidcock v Bishop*, 3 B & Cr 605 See *Maltby's case*, cited 1 Dow, 294

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under no obligation to disclose the purpose for which the money was intended to be applied, and that the concealment of the existing debt did not avoid the contract of suretyship (s).

So, where a person procured an advance of 500*l*., for the repayment of which two other persons became sureties, and in pursuance of a previous agreement, the borrower handed over 125*l*. out of the 500*l*. as a loan to one of the sureties without the knowledge of the other surety, it was held that there was no such concealment of a material fact as to pre-judicially affect the position of the latter (t).

Creditor,
when bound
to make in-
quiries as to
fraud

A creditor is not, as a general rule, bound to inquire into the circumstances under which a person becomes surety to him for debt, unless the circumstances are of such a nature as that the creditor ought to raise a reasonable ground of suspicion in his mind that the surety has been induced to assume his obligations by fraud on the part of the debtor; under such circumstances the creditor is bound to make inquiries (u).

Application of
the rule to
mortgages of
life policies.

The rule that the fullest disclosure must be made to the surety would seem to be applicable with the utmost strictness when a third party concurs in a mortgage of a policy of life assurance for the purpose of guaranteeing the payment of the mortgage moneys, and the punctual payment of the premiums; for in such cases the creditor and the assured have full knowledge of all circumstances affecting the health of the assured, and other matters with regard to which the surety cannot readily obtain information (x).

Alteration of
conditions of
contract

ii.—Of the Discharge of the Surety by Subsequent Transactions.—The contract of suretyship is construed in the strictest manner, so that the surety will only be bound according to the strict letter of his engagement (y). If it is in any way altered without his consent, even for his benefit or innocently, he is entitled to be discharged (z). He is discharged by an arrange-

(s) *Hamilton v. Watson*, 12 Cl. & F. 109.

(t) *Machreth v. Walmsley*, 51 L. T.

(u) *Owen v. Homan*, 4 H. L. C. 997. See *Martland v. Irving*, 15 Sim. 437.

(x) See *North British Insurance Co v. Lloyd*, 10 Exch. 523, *Wythes v.*

Labouchere, 3 De G. & J. 593.

(y) *Stamford, & Co. Bkg. Co. v. Bal*, De G. F. & J. 310, *Blest v. Brown*, De G. F. & J. 367, 376.

(z) *Blest v. Brown*, *sup.*, *Samuel Howarth*, 3 Mer. 272, *Gardner v. Wa*, 5 E. & B. 83, *Polak v. Everett*, 1 Q. B. 669, *Holme v. Brunskill*, 3 Q. B. 495.

ment between the mortgagee and the mortgagor affecting a fund which the surety had a right to rely on (*a*). Any departure from the conditions will discharge him, even though he is not thereby prejudiced (*b*).

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An absolute release of the principal debtor of course discharges the surety by extinguishing the debt; and in such a case the creditor cannot reserve any rights against the surety, as the debt is gone, so that no rights of action with regard to it can remain.

Absolute release of principal discharges surety.

Although, of course, payment off of the debt by the principal discharges the surety from all obligations in respect of it, yet a payment which is subsequently set aside for fraudulent preference is not a satisfaction of the debt as to discharge the surety (*c*).

Effect of payment of debt subsequently set aside

If the creditor enters into a binding contract with the principal debtor to give him further time to pay, without the concurrence of the surety, the surety is discharged, because the creditor has put it out of his own power to enforce immediate payment, which the surety would have a right to require him to do (*d*).

Effect of giving time to principal debtor.

A parol agreement for good consideration to give time to the principal debtor, being enforceable in equity, will discharge the surety, although the principal is bound by deed (*e*).

Parol agreement to give time.

A parol agreement to alter the contract, between the creditors and principal debtor, was no answer at law to an action on a bond against a surety, but a Court of Equity would, in such case, have interfered (*f*).

There must, however, be a clear and binding contract with the principal debtor to give time in order to discharge the surety (*g*). An agreement without consideration is not binding, and will not discharge the surety (*h*). So, also, mere forbearance from suing the principal debtor, without a positive

Agreement to give time must be binding

(*a*) *Gen Steam, & Co v Rolt*, 6 Jur. N S 801 See *Mortgage Insurance Corp v Pound*, 65 L J Q. B 129

(*b*) *Lawrence v Walmsley*, 31 L J. C. P 143

(*c*) *Petty v Cooke*, L R. 6 Q. B. 790

(*d*) *Bank of Ireland v Beresford*, 6 Dow, 238, *Oakeley v Pasheller*, 4 Cl & F 207 See *Nisbet v Smith*, 2 Bro C C 579, *Rees v. Berrington*, 2 Ves Jun 540, *Strong v Foster*, 17 C B 219, *Oriental Financial Corp v Overend, Gurney & Co*, L. R. 7 Ch. A

142, *Bolton v Buckenharv*, (1891) 1 Q. B 278, C A

(*e*) *Blake v White*, 1 Y. & C Ex. 420, *Nisbet v. Smith*, 2 Bro C C 579

(*f*) See *Davey v Prendergrass*, 5 B. & Ald 187, and cases in note to *Heath v Key*, 1 Y. & J. 434.

(*g*) *Heath v Key*, *supra*, *Clarke v. Builey*, 41 Ch D 422

(*h*) *Blake v White*, 1 Y. & C Ex 420, *Clarke v Wilson*, 3 M. & W 208, *Lyon v Holt*, 5 M. & W 250, *Tucker v Laving*, 2 K. & J 740

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Conditional
agreement to
give time

Alteration
of period of
redemption
of mortgage

Additional
security for
debt

Release of
principal from
liability under
covenant.

Exception to
rule where
remedies of
surety are not
affected.

and binding contract to that effect between him and the creditor, will not discharge the surety (i)

A conditional agreement does not discharge the surety where the agreement does not become binding, from the condition not being performed (k)

Where a consolidated mortgage contains a covenant by the principal debtor to pay the mortgage debt at a later date than that fixed by the deed to which the surety was a party, this necessarily suspends the remedy against the principal debtor, and consequently amounts to a giving of time which will discharge the surety (l).

The giving of additional security by the principal debtor to the creditor is not necessarily of itself a giving of time to the principal (m). But the taking in lieu of an equitable mortgage by deposit of a legal mortgage for a larger amount, with a covenant for payment of the principal at a later date, was held to amount to a giving of time to the principal debtor so as to discharge a surety who had guaranteed the repayment of the original loan (n).

Where a surety guaranteed the payment of premiums of a mortgaged policy, the release by the mortgagee of the mortgagor from personal liability under his covenants to pay the premiums, was held to discharge the surety (o).

The surety will not be discharged by a contract with a stranger to give time to the principal debtor, nor by the taking a further security from the principal, provided the creditor's remedy under the existing security be not thereby suspended (p)

Nor is the surety in a simple contract security discharged by the principal debtor giving a specialty, by way of further security, to the creditor, though the creditor agree to give the debtor time on the specialty (q).

(i) *Samuel v Howarth*, 3 Mer 278, *Wright v Simpson*, 6 Ves 734, *Bell v Banks*, 3 Man & Gr 258, *Bonser v Cox*, 13 L J. Ch. 261, *Heath v Key*, 1 Y. & J 434, *Holter v Eyre*, 9 Cl & F 57

(k) *Price v Edmonds*, 10 B & C 578

(l) *Bolton v Buchenham*, (1891) 1 Q B 278, C A.; *Bolton v. Salmon*, (1892) 2 Ch 48

(m) *Overend, Gurney & Co v Oriental Financial Corp*, L R 7 H. L 348

(n) *Munster and Leinster Bank v France*, 24 L R. Ir. 82, C. A.

(o) *Lowes v. Maughan and Fearon*, 1 O & E 340

(p) *Fraser v. Jordan*, 8 E & B 312 See *Norris v Aylett*, 2 Camp 329; *Twoopenny v Young*, 3 B & C 208, *Emes v Widdowson*, 4 Car & P. 151; *Croydon Commercial Gas Co v Dickinson*, 2 C P D 46 So also the acceptance of a new bill as a collateral security does not discharge the drawer *Pring v Clarkson*, 1 B & C 14, *Bedford v Deakin*, 2 B & Ald 210

(q) *Twoopenny v Young*, 3 B & C 208, *Bell v. Banks*, 3 Man & Gr 258

The rule as to the effect of giving time has been held to be inapplicable to cases where the agreement between the principal debtor and the creditor does not in substance, though it may in appearance, amount to giving time (*r*)

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On giving time to the principal debtors, or other indulgence not amounting to an absolute release or obliteration of the debt, the creditor may reserve all his rights against the surety (*s*); and it is immaterial whether the surety is informed of the arrangement (*t*).

Exception where rights against surety are reserved

If time is given to the principal debtor with a reservation of the right to go against the surety, the latter is not discharged (*u*) Sir W Page-Wood, V-C, thus states the principle upon which this exception to the general rule is founded:—"When the right is reserved the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial" (*x*)

So, though a simple release of the principal debtor discharges the surety, because otherwise the surety could sue the principal debtor notwithstanding the release, and so render it futile, yet, where the bargain is that the creditor is to retain his remedy against the surety, there is no fraud on the principal debtor, and the Court will give effect to the intention of the parties by construing the release as a covenant not to sue the debtor (*y*).

Effect of release of principal where remedies against surety are reserved

Where the deed containing the reservation of rights against the surety amounts not to an absolute release, but only to a covenant not to sue the principal, the surety is not discharged, for the surety may still pay the creditor and sue the principal (*z*)

So, also, if the creditor releases or discharges one surety, the others will be discharged (*a*), unless the release can be construed

Release of one co-surety discharges all

(*r*) *Hulme v Coles*, 2 Sim. 12. *Price v Edmonds*, 10 B & Cr 578. And see *Prendergast v Devey*, 6 Madd 124

(*s*) *Owen v Homan*, 4 H L C. 997, 1037. *Webb v Hewitt*, 3 K & J. 438

(*t*) *Webb v Hewitt*, *sup*

(*u*) *Boulbee v Stubbs*, 18 Ves 20

(*x*) *Webb v Hewitt*, 3 K & J 442

(*y*) *Re Natal Investment Co*, L. R. 6 Ch. A. 43, at p 47

(*z*) *Green v Wynn*, L. R. 4 Ch. A. 204. *Thompson v Lach*, 3 C B 540. *Bateson v Goshing*, L. R. 7 C P 9. *Price v Barker*, 4 E & B 760. *North v Wakefield*, 13 Q B 536. *Keyes v Elkin*, 5 B & S 240, 253

(*a*) *Cheetham v Ward*, 1 B & P. 633. *Nicholson v Revill*, 4 A. & E. 675. *Exp Jacobs, Re Jacobs*, L. R. 10 Ch. A. 211.

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as merely a covenant not to sue, and rights against the other sureties are reserved (b).

Satisfaction of debt

Where an agreement is a satisfaction of the debt, although not a release at law, a reservation of the right against the surety will be bad as inconsistent with the security (c).

Loss of security.

If by the neglect of the mortgagee the benefit of all or some of the securities is lost, the surety is *pro tanto* discharged (d).

Assignment of judgment by debtor as collateral security.

If a debtor assigns a debt, due to himself under a judgment, to his creditor, by way of collateral security, and such debt afterwards becomes irrecoverable, it seems that the loss will not fall upon the creditor merely because he gave time to the debtor under the judgment (e); though if he takes out execution, and so assumes, as it were, the control of the judgment, and then is guilty of neglect in levying, he becomes answerable for the loss (f).

Discharge of surety by other acts or omissions of creditor

The surety may be discharged by the creditor's wasteful application of the principal's estate (g); by his neglect to file a warrant of attorney whereby he is prevented from entering up judgment and issuing execution (h); or by omission to register a bill of sale (i); or an assignment of a ship (k); or by neglecting to insure according to contract (l); or by neglecting to realize a collateral security (m); or by not presenting a bill of exchange for payment at maturity (n); or by not giving notice of a mortgage of the debtor's life interest to the trustees of the settlement (o); or by the creditor taking a surrender from his debtor of a lease for the performance of the covenants in which the surety had given security (p); or by a release of the mortgage to the mortgagor's trustees in bankruptcy in consideration of a conveyance of the equity of redemption, instead of proving in the bankruptcy (q).

(b) *Price v. Barker*, 4 E & B 777, *Bailey v. Edwards*, 4 B & S 761. See *Exp. Good, Re Armitage*, L. R. 5 Ch. 46, C. A.

(c) *Webb v. Hewitt*, 3 K & J 438, *Kearseley v. Cole*, 18 M & W 128. See *Mun v. Claeferd*, L. R. 2 H L Sc 456.

(d) *Capel v. Butler*, 2 S & St 457, *Strange v. Fooks*, 4 Giff 408, *Wulff v. Jay*, L. R. 7 Q B 756.

(e) *Williams v. Price*, 1 S & St 537.

(f) *Williams v. Price*, *sup*, *Mayhew v. Crockett*, 2 Sw. 191.

(g) *Mutual Loan Fund Assoc. v. Sudlow*, 5 C B N S. 449.

(h) *Watson v. Alcock*, 4 De G M & G 242.

(i) *Wulff v. Jay*, L. R. 7 Q B 756.

(k) *Capel v. Butler*, 2 S & St 457. See *Shaton v. Eastall*, 2 T R 366.

(l) *Watts v. Shuttleworth*, 7 H & N 358.

(m) *Mutual Loan Assoc v. Sudlow*, *sup*.

(n) *Latham v. Chartered Bank of India*, L. R. 17 Eq 205.

(o) *Strange v. Fooks*, 4 Giff 408.

(p) *Lord Harbenton v. Bennett*, Beat 386. And see *Ewin v. Lancaster*, 6 B & S 571.

(q) *Pledge v. Buss*, John 663.

A mortgagee must not by his own act, or by consenting to acts of the mortgagor, render unavailable any part of the security to the benefit of which a surety is entitled.

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So, a mortgagee cannot apply the security in satisfaction of any other debt than that for which the surety is liable; as where a landlord, holding a mortgage of the furniture of his tenant for a debt for which the surety was liable, distrained on the furniture for rent (r).

Security cannot be applied for another debt.

In such a case the surety will be discharged *pro tanto* (r).

But where a mortgage deed provided that the mortgagor, who was a farmer, should continue in possession and management of the mortgaged property till default, and the mortgagor, with the consent of the mortgagee, sold certain live stock included in the security, it was held that the liability of sureties for payment of the mortgage moneys was not affected thereby, though the purchaser had failed to pay the price, so that the value of the security was diminished, as it must have been within the contemplation of all parties that the mortgagor, while in possession, should have power to deal with the live stock in the usual conduct of the farm business (s).

Sale of stock by mortgagor with consent of mortgagee in course of business.

Mere passive acquiescence by the creditor in acts of the principal debtor which are contrary to the strict conditions of the security, or otherwise improper, is not sufficient of itself to discharge the surety (t).

Acquiescence of creditor in wrongful acts

If one of several co-sureties or joint debtors be absolutely released, all the others are discharged (u), and parol evidence is not admissible of an alleged agreement to reserve the right against the rest (w).

Release of a co-surety.

If the creditor releases one co-surety, such release not amounting to an extinguishment of the debt, he may still claim a proportion of the debt against the other (y). If, however, the sureties are several, not joint, a release of one surety is only a discharge of the co-surety where the right of contribution has been taken away or injuriously affected (z).

(r) *Pearl v. Deacon*, 1 De G. & J. 461

(s) *Taylor v Bank of New South Wales*, 11 App. Cas. 596, P O

(t) *Mayor, &c of Durham v Fowler*, 22 Q B D 394, *Mayor, &c of Kingston-upon-Hull v Harding*, (1892) 2 Q B 494, C A

(u) Y B. 21 Edw IV. 81, B pl. 33,

Nicholson v Revill, 4 A. & E 675

(w) *Evans v. Bremridge*, 8 De G. M & G. 100.

(y) *Exp Gifford*, 6 Ves. 805, *Whiting v Burke*, L R. 6 Ch A 342, *Exp Snowden*, 17 Ch D 44, C A, *Re Ennis*, *Coles v Peyton*, (1893) 3 Ch 238, C A.

(z) *Mercantile Bank of Sydney v Taylor*, (1893) A. C 317, P. C.

CHAPTER IX.

Extent of
discharge of
surety by
giving time,
&c

Where a person joined in the grant of an annuity as a surety for the payment of the same quarterly, it was held that the giving time to the principal grantor discharged the surety from liability in respect not only of future payments, but also of past arrears of the annuity (*a*).

The giving time to the principal debtor will not only discharge the surety from all personal liability, but will also release any property which the surety has included in his contract as security for the debt (*b*).



SECTION III.

OF THE LIABILITY OF SURETIES.

Liabilities
and rights of
surety regu-
lated by in-
strument of
guaranty.

i.—Nature of Liability.—Inasmuch as the guaranty must be in writing, which cannot, generally speaking, be explained or varied by parol evidence (*c*), it follows that the liabilities and rights of the surety are regulated by the express or implied terms of the instrument of suretyship. When the obligation exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived (*d*). So, where the principal and the surety are bound jointly, but it is alleged that the intention was that they should be bound jointly and severally, the Court will not alter the instrument on conjecture (*e*). Where, however, a guaranty is not explicit in its terms, it must, like every other contract, be construed reasonably with regard to the surrounding circumstances of the case (*f*). A covenant by a surety to pay interest on the mortgage money “during the continuance of the security” was held to render him liable to pay the interest after default of the principal in payment of the mortgage money on the day fixed, so long as any principal money remained unpaid (*g*).

Creditor has
immediate
right of action

In the absence of stipulation to the contrary, so soon as the principal has made default in payment of the debt for which

(*a*) *Eyns v Barthrop*, 3 Madd 221.

(*b*) *Boiton v Salmon*, (1892) 2 Ch 48.

(*c*) *Ante*, p 80.

(*d*) *Sumner v Powell*, 2 Mer. 30, 36.

(*e*) *Rawstone v Parr*, 3 Russ 539,
reversing decision of M R, *S. C.*,
ibid 424.

(*f*) *Lloyd's v Harper*, 16 Ch D 290,

303 And see *Newell v Radford*, L R.

3 C P 52, *Hesfield v Meadows*, L R.

4 C P 595, *Laurie v Scholefield*, L R.

4 C P 622, *Coles v Pack*, L R 5 C
P 65.

(*g*) *King v Greenhill*, 6 Man. & Gr
59.

the surety is responsible, the creditor has an immediate right of action against the surety, without first suing the principal (*h*). Where, however, a guaranty was expressly given on condition that no application should be made to the surety for payment, but on failure of the "utmost efforts and legal proceedings" of the creditors to obtain payment from the principal, it was held that the creditors, not having shown that they had used their utmost efforts against the principal, could not maintain their action against the surety (*i*).

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against surety
on default of
principal

So, also, in the absence of stipulation, a creditor need not first resort to securities given to him by the principal debtor before suing the surety (*k*). And even where the guaranty contained a stipulation that the creditor should not sue the surety until he had availed himself of all *bonâ fide* securities held by him of the principal debtor, and it was shown that there were no securities of any material value, it was held that the surety could not set up the stipulation as a defence to the action, though the creditor had not attempted to realize any of the securities, nor first sued the principal (*l*).

Creditor need
not first
realize secu-
rities.

It has been repeatedly held that the creditor need not even make any demand upon the principal debtor before suing the surety (*m*), unless by the terms of the contract the debt is made payable only on demand. But, where a mortgage contained a joint and several covenant by a person and his father, who joined as surety, for payment of the mortgage moneys "on demand," it was held that the right of action against the surety did not accrue until demand was first made (*n*). In this case it is to be observed that it appeared by the terms of the mortgage deed the father was a surety only, and not, as between himself and the mortgagee, a principal debtor.

Demand on
debtor not
necessary

So, also, generally, the creditor need not make any demand for payment on the surety himself (*o*), or even inform the surety of default having been made by the principal (*p*). But

Creditor need
not generally
give notice to
surety of
default of
principal

(*h*) *Wright v Simpson*, 6 Ves 714, at pp 732, 733 See *Padwick v Stanley*, 9 Ha 627

(*i*) *Holl v Hadley*, 2 A & E 758

(*k*) *Wright v Simpson*, *sup*, *Wilks v Heeley*, 1 C & M 249

(*l*) *Musket v Rogers*, 5 Bing N C 728

(*m*) *Warrington v Furber*, 8 East, 242, *Holborow v Wilkins*, 1 B & C 10, *Rede v Fary*, 6 M & S 121, *Lilly*

v Hewitt, 11 Pri 494, *Walton v Marshall*, 13 M & W 452, *Belfast Banking Co v Stanley*, 15 W R 689

(*n*) *Re Brown's Estate*, *Brown v. Brown*, (1893) 2 Ch 300

(*o*) *Hatchcock v Humfrey*, 5 Man & Gr 539

(*p*) *Outler v Southern*, 1 Wms Saund 115, *Ken v Mitchell*, 2 Chit G P 487 See *Carri v Brown*, 12 Moo 62.

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the omission to give notice might possibly affect the question of costs; and a surety whose principal has not admitted the debt, and who has received no particulars of demand, will be allowed to defend an action on a specially-indorsed writ without paying money into Court or giving security (*q*).

Exception where stipulation to the contrary expressed,

The terms of the contract of suretyship may, however, expressly stipulate that demand of payment or notice of default shall be made upon or given to the surety, in which case the right of action against him will not arise until the condition has been complied with (*r*).

—or implied.

So, also, there may be a necessary implication from the terms of the contract that notice should be given to the surety before suing him; so, where the guaranty is only to take effect upon the happening of a specified event, that the creditor cannot commence his action against the surety without informing him that the event has happened (*s*).

No privity of contract between principal and surety.

Generally speaking, there is no privity of contract between the surety and the principal debtor (*t*); consequently no act of the principal can enlarge the guaranty, and no admission or acknowledgment by him can fix the surety with an amount other than that which was really due and which alone the surety was liable to pay (*u*).

Surety not liable till default of principal

It is, of course, of the essence of a guaranty that there should be a principal primarily liable for the payment of the debt (*x*), and that the principal should have made default before the surety can be sued (*y*).

When surety may be bound, though principal is not bound

But it does not follow that if the principal debtor is not bound, as where the borrowing the money was *ultra vires*, the surety will be freed from liability. So, where a company having no power to borrow money entered into a contract with another company for the sale of certain rolling stock, and for the rehiring of the same by the former company, and three of the directors of the vendor company guaranteed the payment of the

(*q*) *Lloyd's Banking Co. v Ogle*, 1 Ex D 262

(*r*) *Sicklemore v Thistleton*, 6 M & S 9, *Batson v Spearman*, 9 A & E 298, *Phillips v Fordyce*, 2 Chit 676 See *Payne v Lees*, 3 D & Ry 664

(*s*) *Morten v Marshall*, 9 Jur N S 651

(*t*) *Dangerfield v Thomas*, 9 A & E 292

(*u*) *Exp. Young, Re Kitchen*, 17 Ch.D

668, C A, per James, L J, at p. 671. (*x*) *Bulmyr v Danell*, Salk 27, and see notes to *S C*, in 1 Sm L C. (10th ed) 287, *Chapleo v Brunswick Permanent Building Soc*, 6 Q. B D. 696

(*y*) *Walker v British Guarantee Assoc*, 18 Q B D 277 See *King v Cole*, 15 Q B 628, *Lloyd's v Harper*, 16 Ch. D 290, C A, see also *Hallwell v Counsell*, 38 L. T 176

rent, Kay, J., held that (1) the transaction was a loan on mortgage, and (2) that the guaranty was valid and binding on the sureties (z).

ii.—Extent of Liability.—The liability of the surety to the creditor may continue after the liability of the principal debtor has ceased. It is provided by the Bankruptcy Act, 1883 (a), that an order discharging a bankrupt shall not release any person who was surety or in the nature of surety for the bankrupt.

Liability of surety may continue after discharge of principal in bankruptcy

So it has been repeatedly held, that if the principal debtor is discharged by resolution of the creditors under a composition, the surety remains liable (b). And by the Bankruptcy Act, 1890 (c), it is enacted that—"The acceptance by a creditor of a composition or scheme shall not release any person who, under the principal Act and this Act, would not be released by an order of discharge if the person had been adjudged bankrupt."

Effect of discharge of principal under a composition

In general, the composition deed extinguishes the debt, and with it all collateral securities in the hands of the creditor, whether given at the time of or antecedent to the composition (d). But how far it is competent for a creditor to retain his right to securities given by a surety does not seem in all cases clear. If such a reservation be contained in the composition deed (e), then, whether the surety be a party to such deed or not, the remedy against the surety is kept alive, and he has his remedy over against the debtor (f); nor does the assent of the surety to the composition deed containing such a reservation of remedies put the surety in the same situation as if he had applied to a Court of Equity to sue in the place of the creditor, and had been permitted to use his name upon payment of the debt into Court (in which case it is said he would not have been allowed afterwards to recover over the residue against the principal); to effect this there must be a stipulation that the surety shall stand in the

Effect of extinguishment of debt by composition on securities given by surety

(z) *Yorkshire Wagon Co v. Maclure*, 19 Ch. D 478, reversed on point (1) by C A 21 Ch D 309

(a) 46 & 47 Vict. c. 52, s. 30, sub-s (4)

(b) *Re Jacobs*, L R 10 Ch. A 211, *Ellis v Wilmot*, L R 10 Ex 10, *Megrath v. Gray*, L R 9 C P 216, disapproving of *Wilson v Lloyd*, L R 16 Eq 60. And see *Cragoe v Jones*, L R 8 Ex 81, *Exp Agra Bank, Re Barber & Co*, L R 9 Eq. 725

(c) 53 & 54 Vict c 71. s 3. sub-s (19)

(d) *Cockshott v Bennett*, 2 T R. 763, *Cowper v Green*, 7 M & W 633, *Lewis v Jones*, 4 B. & Cr 506, *Cragoe v Jones*, L R 8 Ex 81

(e) See *Robs Bky* (7th ed) 302

(f) *Exp Gifford*, 6 Ves 805, *Boulton v Stubbs*, 18 Ves 20, *Kearsley v Cole*, 16 M & W 128, *North v Wakefield*, 18 L J Q B 214; *Bateson v Gosling*, L R 7 C P 13, *Nicholson v. Revell*, 4 A. & E 683, *Price v Barker*, 1 Jur. N S 775.

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creditor's place (g); but if the other creditors are not parties to such agreement for a reservation of remedies against the surety, the agreement seems to be invalid as a fraud upon them, unless the surety thereby deprives himself of any remedy over against the principal debtor (h); and even then the case seems not quite free from doubt, when the effect of the composition is to extinguish the debt (i). In cases of this nature it is incumbent upon the surety, when sued by the creditor, to prove want of knowledge, on the part of the other creditors, of the agreement for the reservation of remedies against the surety (k).

Liability of
surety's estate
continues
after his
death

In the absence of stipulation to the contrary, a guaranty, the consideration for which is given once for all, cannot be determined by the surety, and does not cease at his death; but it would seem that if the guaranty is for a present loan and future advances, the surety, or his representatives after his death, may, by notice, determine the liability in respect of advances made after the notice has been given (l). It is, of course, competent for the surety to stipulate in the instrument of guaranty that on notice he shall be discharged from all future liability (m).

In the case of a guaranty of several sureties, which is joint only, the death of one guarantor puts an end to the guaranty, unless the survivors expressly or by implication from conduct agree that it shall continue (n).

Limitation of
liability by
express
stipulation.

The parties to a contract of suretyship may limit the liability of the surety as to duration of time, or as to amount, or other matters, or may make the liability depend on conditions precedent, the fulfilment of which will be necessary to give rise to the liability (o).

Effect of
recitals

In order to ascertain the intention of the parties the instrument of guaranty must be considered as a whole, and for this purpose the operation of the instrument may be controlled by the recitals (p).

(g) *Kearsley v Cole*, 16 M & W 128. And see note to *Lewis v. Jones*, 16 L J 115, supposed to have been written by Holroyd, J, 4 B & Cr 506, 515, or by Cresswell, J, L R 7 C P 14.

(h) Note to *Lewis v Jones*, *sup*, *Davidson v. M'Gregor*, 8 M & W 755. But see *Thomas v Coutinay*, 1 B & Ald 1, *Cowper v Smith*, 4 M & W. 519.

(i) See *Lewis v. Jones*, *sup*.

(k) *Davidson v M'Gregor*, *sup*.

(l) *Lloyd's v. Harper*, 16 Ch. D 290,

C A See *Re Silvester, Midland Rail Co v Silvester*, (1895) 1 Ch 573.

(m) *Calvert v Gordon*, 3 Man & Ry 124, 128.

(n) *Ashby v Day*, 54 L. T 408, C A.

(o) *Burton v. Gray*, L R 8 Ch A 932.

(p) *Glyn v Hertel*, 8 Taunt. 208, *Pearsall v Somerset*, 4 Taunt 593. See also *Lord Arlington v Meyrick*, 2 Wms Saund 813, *Bamford v Iles*, 3 Exch 380, *Peppin v Cooper*, 2 B & Ald 431, *Kitsen v. Julian*, 4 E. & B. 854,

A guaranty of the whole debt, with a limit on the surety's liability in point of amount, is to be distinguished from a guaranty of part only of the debt (*q*)

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Suretyship
for whole debt
with liability
limited to a
less sum

Where one of several partners gives the collateral security of his own separate real estate for future advances, to be made to the firm, to a certain amount, the collateral security will determine on the death of any one of the partners as to any advances not then made, unless the guaranty be clearly intended to be a continuing one (*r*); so a surety for a customer with a bank, who has there a running account, is discharged by any change in the banking firm, as to any sums not actually due at the time of such change (*s*). This does not apply to changes in the members of a company (*t*).

A security may expressly (*u*), or by implication from the circumstances (*x*), extend to advances and transactions made or entered into after a change in the firm (*y*).

And a security given to or by a banking company may be shown to be intended to be a continuing security notwithstanding a change in the firm (*z*).

SECTION IV.

OF THE RIGHTS OF A SURETY.

i.—Rights of Action, &c.—Before the surety has paid or has been called upon to pay anything under his guaranty, he is entitled, so soon as the principal debtor has made default, at all events if the creditor refuses to exercise his right to sue the principal debtor (*a*), to obtain relief in equity by compelling the principal debtor to pay off the debt and so discharge his liability (*b*) “Although the surety is not troubled or molested

Right of
surety to com-
pel principal
to pay debt

Hassell v Long, 2 M & S 362, cases of guarantees on appointments to offices

(*q*) *Ellis v Emmanuel*, 1 Ex D 157.
(*r*) *Bank of Scotland v Christie*, 8 Cl & F 214

(*s*) *Pemberton v Oakes*, 4 Russ 154,
Wright v Russell, 3 Wils K B 530,
Barker v Parker, 1 T R 287, *Myers v Edge*, 7 T. R 254, *Bodenham v Purchas*, 2 B & Ald 39, *Dance v Gardler*, 1 B & P N R 34, *Exp. Marsh*, 2 Rose, 239, *Eyton v. Knight*, 2 Jur 8, *Strange v Lee*, 3 East, 484,

Exp Kensington, 2 V & B 79, *Exp Watson*, 19 Ves 459.

(*t*) *Metcalf v Bruun*, 12 East, 400, doubting *Weston v Barton*, 4 Taunt. 681

(*u*) *Strange v Lee*, *sup*
(*x*) *Metcalf v Bruun*, *sup*
(*y*) *Exp Lloyd*, 3 Dea 305
(*z*) *Pease v Hurst*, 10 B & C 122
(*a*) *Padwick v Stanley*, 9 Ha 627
(*b*) *Antrobus v Davidson*, 3 Mer 569,
579, *Lee v Rook*, Mos 317, *Nisbet v Smith*, 2 Bro C C 579, 582, *Wool-bridge v Norris*, L R 6 Eq 410

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for the debt, yet at any time after the money becomes payable on the original bond, this Court will decree the principal to discharge the debt, it being unreasonable that a man should always have such a cloud hanging over him" (c). In a recent Irish case (d), it has been held that, to support such an action, it is not necessary that the creditor should have refused to sue the principal debtor.

Right of
surety to com-
pel creditor to
sue principal.

It would seem that the surety may also, before he has been called upon to pay anything under his guaranty, upon default of the principal debtor, bring an action against the creditor to compel him to enforce his remedies against the principal debtor (e).

Other rights
of surety who
has not paid
anything

Though the surety has not himself paid anything, if the debt has been satisfied *abunde* in equity, he may, since the Judicature Act, 1873 (f), rely on such satisfaction as a defence to any action which might, but for that Act, have been brought against him in respect of his continuing obligation at law. He may also obtain a declaration discharging him from liability, where dealings between the creditor and the principal debtor have operated as a release (g); and, in a case of this nature, the Court ordered the instrument under which the surety's liability arose to be set aside and cancelled (h).

Right to
damages for
principal's
default.

If the principal debtor gives to the surety a counter-bond or covenant to pay the amount due to the creditor on a specified day, and makes default, the surety can bring his action for damages on the bond or covenant (i).

Rights of
surety when
called on
to pay

If a surety is called upon to pay a debt under his guaranty, he is entitled to compel the creditor having another fund which the surety, if he pays the debt, cannot make available, to resort to that fund in the first instance (k).

Right to set
off debt due
from creditor
to principal

A surety who is being sued by the creditor may set off a debt due by the creditor to the principal debtor arising out of the transaction on which the liability arises (l).

Right to sign
judgment
against
principal.

A surety having from his principal a special promise to indemnify him against "any risk, damage, or costs which might

(c) *Ranelagh v Hayes*, 1 Vern. 189,
per Id. North, K

(d) *Mathews v Saurin*, 31 L. R. Ir.
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(e) *Wright v Simpson*, 6 Ves 714,
733, *Boulbee v Stubbs*, 18 Ves 20

(f) 36 & 37 Vict. c 66, s 34,
sub-s 5

(g) *Wilson v Lloyd*, 21 W. R. 507

See *Exp Bishop, Re Fox, Walker & Co*,
15 Ch D 400, C A.

(h) *Blest v. Brown*, 4 De G. F. & J
367.

(i) *Penny v Foy*, 8 B & C. 11, *Loose-
more v Radford*, 9 M & W 657

(k) *Exp. Kendall*, 17 Ves. 514

(l) *Bechervaise v. Lewis*, L. R. 7 C. P.
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arise to him as surety" is entitled, on being sued by the creditor, to sign judgment against the principal under R. S. C., Ord. XVI. r. 55, before he has actually paid anything in discharge of the liability (m).

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So soon as the appointed time of payment arrives, but not before, the surety may, without the assent of, or notice to, the principal debtor, voluntarily pay off the debt; and if he does so, he will acquire the same rights and remedies as against the principal debtor, the creditor and his co-sureties, if any, respectively, as if he had made the payment on the demand of the creditor (n).

Right of surety to pay off debt voluntarily, and his remedies thereupon

After the surety has actually made any payment on account of the debt guaranteed by him, he may at once sue the principal debtor for repayment of the amount so paid. "Where one person is surety for another, and compellable to pay the whole debt, and he is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal" (o). The right of the surety to sue the principal to recover money paid by him arises as soon as he has paid anything on account of the debt (p).

Rights of surety after payment to recover from principal

In order, however, to entitle the surety to recover from the principal, the guaranty must have been given at the request of the principal (q).

Guaranty must be at request of principal

It is not necessary, however, that there should be any consideration moving from the principal debtor to the surety in order to render the contract of suretyship valid, so as to entitle the surety to his remedies against the principal (r).

Consideration between them unnecessary

ii.—Right to Indemnity.—In the absence of any express contract to the contrary, a principal is liable, upon an implied promise, to indemnify his surety from any loss that he may sustain in that character (s). This liability will continue notwithstanding the acceptance by the creditor of a composition

Implied contract for indemnity of surety

(m) *English and Scottish Mercantile Investment Trust v. Gratau*, 36 W R 238.

(n) *Davies v. Humphreys*, 6 M & W. 153, *Newton v. Chorlton*, 10 Ha 646, 652.

(o) *Per Ld. Kenyon*, C J, in *Evall v. Farbridge*, 8 T R 308, 310. See *Warrington v. Furber*, 8 East, 242.

(p) *Davies v. Humphreys*, 6 M & W

153, at p 167.

(q) *Jones v. Broadhurst*, 9 C B 173, 193 *et seq.*, *James v. Isaacs*, 12 C B 791, *Cook v. Lester*, 13 C B N S 543, 594, *Kemp v. Balls*, 10 Exch 607.

(r) *Exp. Minet*, 14 Ves 190.

(s) *Toussaint v. Martinant*, 2 T R 100, *Pownall v. Ferrand*, 6 B & C 439. See *Duffield v. Scott*, 3 T. R 374.

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Formerly
surety had
no right to
transfer of
specialties, &c

from the principal, if by the composition deed the creditor reserves his rights against the surety (*t*)

A surety paying off a debt formerly became a simple contract creditor only of the principal debtor for the amount so paid, and was not entitled to the benefit of any personal obligation of the nature of a specialty existing between the principal and the creditor by virtue of any covenant or otherwise (*u*). So, although the surety might recover of the principal the sum he was obliged to pay, yet he could not require the assignment of a bond for that purpose (*x*). But now, by the Mercantile Law Amendment Act, 1856 (*y*), it is enacted as follows:—

A surety who discharges the liability shall be entitled to an assignment of all securities held by the creditor, and to stand in the place of the creditor, and use his name if necessary, in order to obtain indemnification

“Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled (*z*) to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all remedies, and, if need be, upon a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him. Provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned persons shall be justly liable”

Limitation of amount recoverable from any co-surety, &c

Assignment of securities not necessary.

The right of a surety who has paid off the principal's debt to stand in the place of the creditor is not affected by the fact that the surety has not actually obtained an assignment of the securities for the debt (*a*).

Act applies to co-debtors.

This statute applies to a co-debtor as well as to a surety, and gives a right to an assignment of a judgment against the

(*t*) *Close v Close*, 4 De G M & G 176

(*u*) *Copps v Middleton*, T & R 224. See *Robinson v Wilson*, 2 Madd 434, *Jones v Davids*, 4 Russ 277, *Hodgson v Shaw*, 3 My & K 183

(*x*) *Gammon v. Stone*, 1 Ves Sen 339,

Woffington v Sparks, 2 Ves Sen 569

(*y*) 19 & 20 Vict c 97, s 5

(*z*) See *Phillips v Dickson*, 8 C B N. S 391

(*a*) *Lightbown v M'Myn*, 33 Ch. D 575

debtors, although by discharge of the debt the judgment is satisfied (*b*). CHAPTER IX

Although under this provision a surety who discharges a specialty debt becomes a specialty creditor of the principal debtor, a specialty debt is not created by reason of the enforcement by the surety of his right to indemnity against a specialty debt, for which he is liable, but which he has not discharged (*c*). When specialty of surety is created

This Act applies to a contract made before the Act if the breach takes place and the payment is made after the Act (*d*). Act is retrospective.

The Court has no power under sect 5 to enforce the remedy of one co-surety against the other (*e*). As to co-sureties

Independently of the statute, a surety who pays off the mortgage debt, or any part thereof, being the whole remaining due (*f*), is entitled to the benefit of every security which the mortgagee has against the principal debtor (*g*), whether the surety was or was not aware of the existence of the securities (*h*), and even though the securities are taken by the creditor after the contract of suretyship was entered into (*i*). The rule is thus laid down by Lord Brougham, C. (*k*), adopting the language of Sir J Romilly *arguendo* in an earlier case (*l*): "A surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety; having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those remedies against the debtor"

Thus, for example, if a bond is given by principal and surety, and at the same time a mortgage is executed by the principal debtor to the creditor without the knowledge of the surety for

(*b*) *Batchellor v Lawrence*, 9 C B N S 543 See *Re Swan*, Ir R 4 Eq 209, *Silk v Eyre*, Ir R 9 Eq 393

(*c*) *Fergusson v Gibson*, L R 14 Eq 379

(*d*) *Lockhart v Reilly*, 1 De G & J 476, *Re Cochran's Estate*, L R 5 Eq 209

(*e*) *Phillips v Dickson*, 8 C B N S 391, 29 L J O P 223

(*f*) *Ewart v Latta*, 4 Macq H L 983

(*g*) *Mayhew v Crickett*, 2 Swanst 191,

Allen v De Lisle, 3 Jur N S 928, *Goddard v Whyte*, 2 Giff 449

(*h*) *Mayhew v Crickett*, 2 Swanst 191, *Lake v Bruton*, 8 De G M & G 440, *Duncan v North and South Western Bank*, 6 App Cas 1

(*i*) *Forbes v Jackson*, 19 Ch D 615 See *Pledge v Buss*, Johns 663, *Lake v Bruton*, *sup*

(*k*) *Hodgson v Shaw*, 3 My & K. 183, at p 191

(*l*) *Craythorne v Swinburne*, 14 Ves at p. 162

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securing the debt, the surety paying off the bond debt will be entitled to stand in the place of the creditor in respect of the mortgage (*m*). So, if there be but one specialty, viz, the mortgage, the surety being bound as such by simple contract only (*n*).

Exception where part only of debt is guaranteed.

The above doctrine does not, however, apply where the surety guarantees one part of the debt, and the security is given for another part (*o*), but it applies when the security is given subsequently though by an independent transaction (*p*).

Right only arises where the debt is wholly paid off

A surety will not be entitled as against the creditor to the benefit of the security unless he has paid the whole debt, or so much thereof as for the time being remains unpaid. So, where a security was given for a floating balance of 2,000*l*., and when the debt reached 4,600*l*. a surety for 2,000*l*. paid a sum of 3,000*l*. in discharge of his guarantee, but the security was not given up, the creditor was entitled to hold the security for the balance (*q*).

Effect where principal gives further security

The right of the surety to the principal security is not affected by a further mortgage by the mortgagor to a person who had notice of the first mortgage, though the subsequent mortgagee has got in the legal estate (*r*).

Where a prior debt exists.

Where the mortgagor has given a collateral security for the original debt and borrows a further sum, which is guaranteed by the surety, the latter is entitled to the surplus value of the securities after payment of the original debt towards payment of that for which he is surety (*s*).

Surety for Crown debtor.

A surety for a Crown debtor may obtain an order to stand in the place of the Crown and to have the benefit of an extent (*t*), which will give him priority over subsequent mortgagees and execution creditors of the principal (*u*).

Indemnity on other property

If the surety take from his principal by way of indemnity a

(*m*) *Copus v Middleton*, T & R 231.

(*n*) *Hodgson v Shaw*, 3 My. & K 195

(*o*) *Wade v Coope*, 2 Sim 155, *South v Bloxam*, 2 H & M 457

(*p*) *Pledge v Buss*, John 663, overruling *Newton v Chorlton*, 10 Ha 646. And see *Lake v Brutton*, 8 De G M & G 440, *Coates v Coates*, 33 Beav 249, *Goddard v Whyte*, 2 Giff 449, *Campbell v Rothwell*, 38 L T N S 33

(*q*) *Waugh v Wren*, 9 Jur N S 365, 11 W R 244

(*r*) *Drew v Lockett*, 32 Beav 499

And see *Bowker v Bull*, 1 Sim N S. 29, *Lancaster v Evers*, 10 Beav 154. See further as to tacking against sureties, *post*, p 1235

(*s*) *Praed v Gardner*, 2 Cox, 86, *Copus v Middleton*, T & R 224, *Hodgson v Shaw*, 3 My. & K 183, 195. But see *Allen v De Lisle*, 5 W. R. 158

(*t*) *Reg v Salter*, *Reg v Robinson*, 1 H. & N 274, 275, n

(*u*) See *post*, p 1366

security upon other property, he loses his right to the principal security (*x*), unless he did so in ignorance of the principal security, which was available for his indemnity (*y*).

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When the principal debtor has deposited the title deeds of an estate with, and conveyed the estate to, the surety, by way of indemnity, against his liability under a joint bond, although the surety or his executors be induced, by a false representation of the debtor, to deliver up the title deeds, that will not give the debtor a right to call for a reconveyance until the indemnity is fully carried out (*z*).

Securities given by principal to surety

A creditor is not entitled to the benefit of securities given by the principal debtor to a surety by way of indemnity (*a*).

If money be paid by a surety in discharge of a security, which afterwards proves to be sufficient, the surety is entitled to be reimbursed before subsequent incumbrancers of the mortgaged property (*b*).

Right of surety as against puisne incumbrancers.

The surety for a debt has also an equitable right to the preservation of the security by reason of his liability to pay the debt, but as the wasting of the security by the default of the creditor causes the release *pro tanto* of the surety, it is unnecessary for the latter to take active steps to maintain his rights (*c*).

Right of surety to preservation of security

Upon an assignment by the mortgagee the obligation of preserving the securities for the surety attaches upon the assignee (*d*).

Where the surety pays off the debt of the mortgagor and becomes entitled to all the securities, he may set off the amount paid against a debt due by himself to the owner of the equity of redemption (*e*); and if such owner is a joint stock company, he may set it off against calls as if he had been mortgagee when they fell due (*e*); and this he may do in bankruptcy, notwithstanding the principle which prevents a debt assigned after the bankruptcy from being set off against a debt to the bankrupt's estate.

Right of surety to set off debt due by him to principal

A surety will have the benefit of voluntary payments made, in respect of a charge on the estates by the agent of the debtor,

Surety entitled to benefit of voluntary payments

(*x*) *Cooper v Jenkins*, 32 Beav 337
(*y*) *Lake v Bruton*, 8 De G M & G 440, *Brandon v Brandon*, 3 De G & J 524

(*z*) *Tyson v Cox*, T & R 395
(*a*) *Exp Waring*, 19 Ves 345, *Re Walker, Sheffield Banking Co v Clayton*, (1892) 1 Ch 621

(*b*) *Sawyer v. Goodwin*, 1 Ch D 351, C A

(*c*) *Fisher, Mortgages* (4th ed), 295, *Coote, Mortgages* (5th ed), 1225.

(*d*) *Wheatley v Bastow*, 7 De G M & G 261

(*e*) *Exp Barrett*, 34 L J Bky 41

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in expectation of rents coming into his hands, though such fund fails; and neither the creditor nor the agent will be allowed to enforce against the surety the securities given by him to the creditor to the extent of the sums so paid (*f*); and similarly, in the well-known case of *Godsall v Boldero*, the insurance office was allowed the benefit of the payment, made by the public, of the debt insured against (*g*). But if the insurers pay the sum insured in their own wrong (that is, either when the creditor has no insurable interest in the life insured, or the contingency, which was insurable, has failed in coming to pass), the debtor cannot have the benefit of such payment in reduction of his debt (*h*).

Payment of
debt by one
co-surety

iii.—Right to Contribution from Co-sureties.—If one of several co-sureties pays off the debt, he may recover against any one of the others his proportion of the money so paid (*i*).

So, if one surety pays more than his proportion, he will be entitled to a contribution for a proportion of the excess (*k*). But a surety, who has not been called upon to pay, and has not paid more than his share, cannot claim contribution from his co-sureties, although they have paid nothing, as there is no legally ascertained debt (*l*). If, however, the creditor has actually obtained judgment against one of several co-sureties for the full amount of the debt guaranteed, such surety, though he has actually paid nothing, may enforce his right to contribution against his co-sureties (*m*). Formerly, at law, only the aliquot part of the money could be recovered from each surety, though one or more of the sureties were insolvent (*n*), but, according to the present practice of the Courts, following the principles formerly adopted in equity, the insolvent co-sureties are struck out and the rest are made to contribute equally (*o*). If one co-surety,

(*f*) *Williamson v Gould*, 1 Bing 171

(*g*) 9 East, 71

(*h*) *Henson v Blackwell*, 4 Ha 434

(*i*) *Cowell v Edwards*, 2 B & P 268,
Deering v The Earl of Winchelsea, 2
B & P 270 And see notes to *S C*
in 1 Wh & Tud L C 114

(*k*) *Ex parte Gifford*, 6 Ves 808

(*l*) *Davies v Humphreys*, 6 M & W
153, *Exp Snouidon*, 17 Ch D 44,
C A

(*m*) *Wolmershausen v Gullick*, (1893)
2 Ch 514

(*n*) *Cowell v Edwards*, 2 B & P 268
See *Deering v The Earl of Winchelsea*

2 B & P 270, *Turner v Davies*, 2
Esp 478, *Browne v Lee*, 6 B & C
689, *Wilson v Cutting*, 4 Moo & Sc
268, *Stirling v Forrester*, 3 Blgh,
575

(*o*) See *Peter v Rich*, 1 Rep in Ch
34, also cited 1 Rep in Ch 151, *Hole*
v Harrison, 1 Ch Ca 246, *Cas*
t Finch, 15, *Swann v Wall*, 1 Rep
in Ch 149, *Lyster v Nelson*, 1 Vern.
456, *Madox v Jackson*, 3 Atk 406,
Angenstein v Clark, 2 Dick 738, *Lawson*
v Wright, 1 Cox, 275, *Cockburn v*
Thompson, 16 Ves 321.

however, becomes bankrupt, a surety who has paid more than his aliquot proportion, having regard to the original number of sureties, may prove for contribution against the bankrupt surety's estate (*p*), or if proof has already been made by the creditor, such surety may stand in the creditor's place (*q*)

If one of several co-sureties, who are jointly and severally liable, dies during the continuance of the guaranty, contribution may be enforced against his representatives (*r*).

The doctrine of contribution amongst sureties is not founded upon contract, but on general principles of justice requiring equality of burden and benefit. Therefore, it makes no difference whether the sureties are bound jointly and severally, or jointly only, or severally only, nor will it make any difference if they are bound by different instruments but for the same debt, even though one person becomes surety by a separate instrument without the knowledge of another surety (*s*).

Foundation
of right to
contribution

There is, however, this distinction, that where sureties enter into separate bonds, the penalties of those distinct bonds will ascertain the proportion in which they are to contribute; but, if they join in one bond, then they must contribute equally (*t*).

Any security obtained by one of several co-sureties from the principal debtor must generally be brought into hotchpot, and will enure for the common benefit of all the co-sureties, even though the giving of such security may have been the condition on which the person taking it consented to become the surety, and though the other co-sureties may have been ignorant that the security had been given (*u*).

Right of co-
surety to have
security
brought into
hotchpot

A surety cannot have contribution from his co-sureties unless he brings in whatever he has received from the principal debtor; *e g*, policy moneys under an insurance on the debtor's life (*x*).

Although the right of contribution among sureties is not founded on contract, but on general principles, yet the right

(*p*) *Adkins v Farrington*, 5 H & N 586, 29 L J Ex 345

(*q*) *Exp Stokes*, De G 618.

(*r*) *Primrose v Bromley*, 1 Atk 88, *Bastard v Hawes*, 2 E & B 287

(*s*) *Deering v The Earl of Winchelsea*, 1 Cox, 322, *Craythorne v Swinburne*, 14 Ves 160, 165, 169, *Whiting v Burke*, L R 6 Ch A 342.

(*t*) *Deering v The Earl of Winchelsea*, 1 Cox, 322.

(*u*) *Steel v Dizon*, 17 Ch D 825
See also *Re Arcedoekne*, *Atkins v Arcedoekne*, 24 Ch D 709, *Berridge v Berridge*, 44 Ch D 168

(*x*) *Re Arcedoekne*, *Atkins v Arcedoekne*, *sup*

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may be qualified by contract (*y*), or may thereby be altogether excluded, so as to render a surety not liable to contribute in any degree (*z*).

So, a contract limiting or negating liability to contribute may be implied from the circumstances of the transaction. Thus, where sureties were bound by different instruments for distinct portions of a debt due from the same principal, it was held that the suretyship of each was a separate and distinct transaction, and that consequently there was no right of contribution between them (*a*).

There is also a distinction between cases where several persons are strictly co-sureties, and where one person is only a surety for the principal and the other surety; thus, where a person gave a separate bond as a supplemental security for the payment of a debt in default of its being paid by the principal or his surety under a former bond, it was held that he was not liable to contribution in favour of the original surety, the latter being, as to the subsequent surety, a principal (*b*).

Rights of
surety on
principal's
bankruptcy

iv.—Right to Proof in Bankruptcy—If the principal debtor becomes bankrupt, the surety may compel the creditor to prove against the estate for the amount due (*c*).

On the bankruptcy of the principal, the surety, if he has paid the whole amount of the debt, may prove for the whole so paid; but if a surety for the whole debt pays only a part, he has no equity to stand in the place of the creditor for such part (*d*). If, however, a person guarantees a limited portion of a debt, and pays the whole of that portion, he has, in respect of it, all the rights of a creditor (*e*).

There is no provision in the Bankruptcy Act, 1883 (*f*), expressly entitling a surety, who has paid after the commencement of the principal's bankruptcy, to prove; nor do the rules framed under that Act contain any provision on this point.

(*y*) *Swain v. Wall*, 1 Rep in Ch 149

(*z*) *Pendlebury v Walker*, 4 Y & C Ex 424, *Craythorne v Swinburne*, 14 Ves 165

(*a*) *Coope v Twynam*, T & R 426

(*b*) *Craythorne v Swinburne*, 14 Ves 160, 171

(*c*) *Exp. Rushforth*, 10 Ves 409 See *Exp. Turner*. 3 Ves. 243, *Paley v.*

Field, 12 Ves 435, *Jackson v Magee*, 3 A & E 57

(*d*) *Exp Rushforth*, *sup.*, at p 420

(*e*) *Hobson v Bass*, L R. 6 Ch A 792, at p 794 See also *Exp Holmes*, My & Cr 301, *Paley v Field*, *sup.*, *Bardwell v Lydall*, 7 Bing 489, *Gee v. Pack*, 33 L J. Q B 49, *Gray v Seckham*, L. R 7 Ch A 680

(*f*) 46 & 47 Vict c. 52.

The decisions under the various enactments would seem to exclude the surety's right of proof under such circumstances (*g*).

If, however, a surety pays a creditor who has already tendered a proof, he is entitled to stand in such creditor's place as to securities, dividends past and future, and all other rights (*h*).

Where the principal is deceased or become bankrupt, and the mortgagee has proved the debt, the surety who has paid the debt is entitled to all the dividends, though he did not set off the dividends in the action against him by the creditor (*i*), and for a proportionate share of the dividend if he is only surety for a part of one debt (*k*).

It would seem that, having regard to the comprehensive terms of sect 37 of the Act of 1883, whereby all debts and liabilities, present or future, certain or contingent, are made provable in bankruptcy, a surety whose liability has arisen on default of the principal may prove against the principal's estate, although the surety has not actually paid the debt (*l*). But perhaps this point cannot be regarded as settled (*m*).

Where one of several co-sureties has paid off the debt, he is entitled, notwithstanding sect 5 of the Mercantile Law Amendment Act, 1856 (*n*), to the benefit of the creditor's proof against another co-surety for the full amount of the debt, and not merely for the proportion which, as between the sureties, he is liable to pay (*o*).

As a general rule, a surety will not be entitled to receive any dividends out of a bankrupt principal's estate until the creditor has received 20s in the pound (*p*).

Where the principal and surety both become bankrupt, and the creditor has been paid in full by dividends from both estates, the trustee of the surety's estate is entitled to prove against the

Principal and
surety both
bankrupt

(*g*) See *Abbott v Hicks*, 5 Bing N C 579, *Young v Taylor*, 8 Taunt 315, *Exp Copplestone*, 4 Deac 54, see also *Paul v Jones*, 1 T R 599, *Kittner v Raynes*, 1 Cox, 105, *Martin v Brecknell*, 3 M & S 39. But see *Soutten v Soutten*, 1 D & Ry 521.

(*h*) *Exp Johnson*, 3 De G M & G 218, *Forbes v Jackson*, 19 Ch D 316.

(*i*) *Thornton v McKewan*, 1 H & M 525, *Hobson v Bass*, L R 6 Ch. A 792, *Midland Banking Co v Chambers*, L R 4 Ch A 398, L R 7 Eq 179, *Goodwin v Gray*, 22 W R 312.

(*k*) *Gray v Seckham*, L R 7 Ch A 680. See *Exp Holmes*, M & Chit

301, *Ellis v Emmanuel*, 1 Ex D 157, C A.

(*l*) See *Hardy v Fothergill*, 13 App. Cas 351. The point was so decided in *Re Herapath and Delmar*, 7 Mor 129, but the circumstances of that case were peculiar.

(*m*) *Re Parrott, Exp Whittaker*, 63 L T 777.

(*n*) *Ante*, p. 95.

(*o*) *Ex parte Stokes*, De G 618; *Re Parker, Morgan v. Hill*, (1894) 3 Ch 400, C A.

(*p*) *Exp Turquand, Re Fothergill*, 3 Ch D 445.

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estate of the principal for all sums paid out of the surety's estate to the creditor (*q*)

Where both principal and surety became bankrupt, and the creditor received dividends of 10s in the pound from each estate, the assignees of the surety were held entitled to all future dividends under the creditor's proof out of the principal's estate until they should be recouped the amount paid by the surety's estate (*r*)

Proof for contribution by bankrupt co-surety

Where one of several co-sureties becomes bankrupt, his liability to contribution, though unascertained at the time of the bankruptcy proceedings, is a debt provable in the bankruptcy (*s*)

Proof against joint and separate estates of partners.

Sureties who, after payment of the debt, have received a dividend on a proof against the joint estate of a banking firm in which their principal was a partner, cannot prove against the principal's separate estate until they have applied to expunge the joint proof (*t*).

Marshalling

The surety is entitled, as against the trustee in the principal's bankruptcy, to marshal securities so as to obtain repayment of moneys advanced to the principal on mortgage and guaranteed by the surety (*u*).

Surety can only charge principal with amount actually paid

v.—Extent of Surety's Rights—Where a surety discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the full amount, but can only claim, as against his principal, what he has actually paid in discharge of the obligation (*x*)

Right of surety to interest

As against the principal debtor and his co-sureties, a surety is entitled to interest on sums paid by him (*y*); but as against the estate of the deceased principal he is not so entitled, though where a fund assigned as a further security had made interest, he was allowed interest out of that interest (*z*).

Interest may be recovered by a surety on the amount paid by

(*q*) *Exp. Johnson*, 3 De G. M. & G 318

(*r*) *Ibid*

(*s*) *Wolmerhausen v Gulleh*, (1893) 2 Ch 514

(*t*) *Exp Carne*, L R 3 Ch A 463

(*u*) *Heyman v Dubois*, L R 13 Eq. 158. See *South v Bloam*, 2 H & M 457, *Exp Saltung, Re Stratton*, 25 Ch D 148, C A.

(*x*) *Reed v Norris*, 2 My & Cr 361, 375

(*y*) *Lawson v Wright*, 1 Cox, 275, *Hutchman v Stewart*, 3 Drew 271, Set Dec pp 1181, 1182, 4th ed, *Re Swan*, L R 4 Eq 209, *Petre v Duncombe*, 2 Lown Max & Poll Fr C 107, *Exp. Bishop, Re Fox, Walker & Co*, 15 Ch D 400, C A.

(*z*) *Caulfield v Maguire*, 2 J. & L. 164.

him for the mortgagor, his principal, through the medium of CHAPTER IX
the mortgage security. It seems, however, that if the charge or mortgage paid off by the surety or his estate is not kept alive, interest will not be allowed the surety on the sums so paid, though a fund which has arisen from the sale of the mortgaged estate of the principal debtor be in Court (a)

The surety's right of action against the principal debtor may be barred by the Statute of Limitations. Time begins to run against a surety suing his co-surety for contribution as soon as his liability has actually been established, not from the time when the debt became payable (b).

a) *Lancaster v Evers*, 10 Beav 266

(b) *Wolmershausen v Gulluck*, (1893)
2 Ch. 514

Part II.

OF THE SUBJECT-MATTER OF MORTGAGES.

CHAPTER X.

OF A MORTGAGE OF FREEHOLDS.

SECTION I.

FORMS OF MORTGAGES OF FREEHOLDS FORMERLY IN USE.

Conveyance
with defeas-
ance

IN early times, the form of a mortgage of freeholds was simple. It consisted of a feoffment, with a condition contained in the same deed, or sometimes in a separate deed of defeasance (executed at the same time), to be void on payment of a given sum, at a given time. On performance of the condition, the mortgagor was restored to his old estate, paramount to all the charges and incumbrances of the feoffee (*a*).

The objections to a mortgage by way of absolute conveyance, with the clause of redemption in a separate deed of defeasance, were that the defeasance might be lost, and then an absolute conveyance would be set up; or that the estate might be conveyed to a *bonâ fide* purchaser without notice, in which case the right to redeem would be wholly defeated, and the mortgagor be left to his remedy against the mortgagee for the fraud. In consequence of the discouragement it received (*b*), this mode of mortgage has become almost obsolete.

Demise and
sub-demise

In some instances the mortgage was effected by a demise and sub-demise; that is, the mortgagor demised the lands to the mortgagee for a long term of years at a peppercorn rent, and then the mortgagee re-demised them at a pecuniary rent, which covered the interest of the money lent, and there was a condition in the original demise that, on payment of the mortgage debt

(*a*) See *ante*, p. 4.

(*b*) See *Cottenell v. Purchase*, Cas

t Talb (Wilhams) 61; *Baker v. Wind*,
1 Ves. Sen 160.

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and interest by a given day, the original term should be at an end, upon which the derivative term would also cease. This mode of mortgage is also nearly obsolete; but if an estate be in hand, and there is a wish to obtain a power of distress for payment of the interest of the mortgage debt, an underlease might still be resorted to. It would, however, it is apprehended, require the duty to be paid as on a *bonâ fide* lease

In some cases the lands were conveyed to a trustee in fee, with a proviso authorizing him to distrain on the lands in the mortgagor's possession, in case the interest shall be in arrear for a given time, with a further declaration appointing the trustee receiver during the time the lands shall be in lease.

Conveyance
in trust.

Or sometimes the mortgagor gave a power of attorney to confess judgment in ejectment in case the interest shall be in arrear, with a covenant to appoint such person a receiver as the mortgagee shall name, in case the lands shall be let

Warrant of
attorney.

Mortgages of freeholds were formerly often, and are still occasionally, effected by demise for a long term of years, attended with a condition in the same deed, that, if the principal and interest be paid within a given time, the lands shall be reconveyed; or that the deeds of mortgage shall be void, or that the term shall cease and determine.

Mortgage of
freeholds for
a term of
years

If the mortgage be by term of years, a covenant is usually inserted on the part of the mortgagor, that, after default made, he or his heirs will, at his own cost, do all lawful acts for confirming the term, or, if required, for conveying the reversion in fee to such persons as the mortgagee, his executors, administrators, or assigns shall direct; for otherwise, the mortgagee would, on foreclosure, obtain a chattel interest only, and not the fee. But if the term, having no rent incident to the reversion, was originally of not less than 300 years, of which not less than 200 years are unexpired, a mortgagee, having by foreclosure extinguished the right of redemption affecting the term in favour of the mortgagor, may, in the absence of such a covenant, by deed, enlarge the term, and so acquire the land in fee simple (c)

Form of
mortgage for
a term

A benefit which formerly resulted from the mortgage being, in the first instance, for a term of years, and not in fee, was that the security and debt devolved together; but, if the

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mortgage was in fee, the land descended to the heir as a trustee for the executor, and the debt vested in the executor, which, in case of the infancy or absence of the heir, created inconvenience (*d*). This inconvenience was remedied by a late Act (*e*), which enabled the personal representative of a mortgagee, on being paid, to reconvey the legal fee. This enactment has been repealed by the Conveyancing Act, 1881 (*f*). In cases of deaths after the commencement of the last-mentioned Act, by s 30 of that Act, an estate or interest of inheritance, or limited to the heir as special occupant, in any hereditaments vested in a sole mortgagee, devolves on his personal representative

Mortgages
for terms now
unusual

A disadvantage of a mortgage for a term is, that the mortgagee, unless by special stipulation, is not entitled to the custody of the title deeds (*g*). In modern practice, mortgages for a term are almost universally abandoned, except where it is desired to raise money on the security of an estate tail without barring the entail further than is necessary for the purpose of giving effect to the security (*h*), as in the case of a lunatic tenant in tail (*i*); and also except in the case of trustees of settlements, in whom long terms of years are vested in trust to raise money for portions and other purposes.

SECTION II

FORM OF MORTGAGE OF FREEHOLDS ACCORDING TO MODERN PRACTICE

Form of
mortgage
in fee

i.—General Scheme of Arrangement of a Mortgage Deed.—In modern practice, mortgages of freeholds are usually made either in fee or for such other freehold interest as the mortgagor has in the lands.

A legal mortgage of freehold land in fee simple may be regarded as furnishing the normal type of a mortgage security. It is therefore proposed in this place to consider in detail the form and contents of such a mortgage, and to point out later, as

(*d*) See *per* Lord Redesdale in *Schoole and Wife v. Sall*, 1 Sch. & L. 176

(*e*) 37 & 38 Vict. c. 78, s. 4

(*f*) 44 & 45 Vict. c. 41.

(*g*) *Wiseman v. Westland*, 1 Y. & J. 117

(*h*) See *Fines and Recoveries Act* (3 & 4 Will. IV. c. 74), s. 21

(*i*) *Re Pares*, 2 Ch. D. 61, C. A.

occasion shall arise, such variations as are necessary or convenient in making mortgages of different kinds of property other than freeholds.

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The present practice with regard to the arrangements of clauses in mortgage deeds is usually as follows.—After the names and descriptions of the parties and the recitals, if any, follows the first witnessing part, containing a covenant for the payment of the principal debt and interest (*j*). This is succeeded by one or more further witnessing parts conveying the property by way of mortgage, subject to a proviso for redemption. Then follow any special clauses relating to the payment of the principal or interest. Next come special clauses relating to the subject-matter of the mortgage, such as restrictions on the mortgagor's power of leasing, and covenants by him for the maintenance or insurance of the mortgaged property. These may be followed by clauses modifying or extending the statutory powers of sale (*k*) and other clauses giving special remedies to the mortgagee.

Arrangement
of clauses in
mortgage
deed

Till recently, covenants for title were generally inserted at the end of mortgages, but these are now usually dispensed with in reliance upon the statutory covenants implied by the mortgagor being expressed to convey as "beneficial owner" or as "trustee," as the case may be.

ii.—The Parties.—All persons who are intended to convey or to take anything under the mortgage deed, or to enter into stipulations in the deed, must be made parties. These parties will usually be the mortgagor of the one part, and the mortgagee of the other part. But sometimes the concurrence of other parties will be necessary for purposes of suretyship, or of signifying consent to the mortgage, or acknowledging receipt of the mortgage moneys, or for other purposes.

Who should
be parties

iii.—The Recitals.—Recitals are frequently unnecessary in a mortgage deed, and may accordingly be dispensed with. They are, however, sometimes necessary or convenient for the purpose of explaining the nature and incidents of the subject-matter of the security, or other matter affecting the form and contents of the deed. A recital of the mortgagor's seisin in fee, free from incumbrances, may be of use so as to render the deed, on the

When recitals
are advisable

(*j*) See *ante*, p. 9

(*k*) As to the powers of sale given

to mortgagees by statute, see *post*,
Vol. II pp. 882 *et seq.*

CHAPTER X

but the words in the operative part were sufficiently wide to embrace another estate not included in either of those instruments, it was held that this last-mentioned estate did not pass (*h*)

Care should be taken in framing the recitals to avoid any repugnancy or inconsistency between them and the operative parts of the deed

Clear operative words not controlled

It is a general and well-settled rule that a recital does not control the operative part of a deed where the operative part is clear (*i*)

Where the recitals in a mortgage deed to secure a partnership debt referred only to certain joint property of the partners, but by the operative part of the deed conveyed that property and "all other hereditaments of them or either of them situate elsewhere in the town of M," it was held that certain separate estate of one of the partners situate in that town was included in the mortgage (*h*)

Similarly, recitals will not control the exercise of rights or powers expressly conferred as incident to the conveyance of the mortgage property. So, where a transfer of a mortgage recited that the mortgage contained a power of sale, and that such power was not intended to be exercised, but by the first operative part of the deed the mortgage debt was assigned, together with

(*h*) *Jenner v Jenner*, L R 1 Eq 361, and compare *Young v Wallingford*, 52 L J Ch 590, and *Alexander v Chashe*, Ll & G t Sugd 145

In addition to the cases above referred to, the following cases may be referred to as affording examples of words of conveyance controlled by recitals *Hagget v Giles*, 2 Roll Abr Graunts (P 2), 491, 45, *Henn v Hanson*, 1 Sid 141, *Thorpe v Thorpe*, 1 Ld Raym 235, *Morris v Wilford*, 2 Show 47, *Moore v Magrath*, 1 Cowp 9, *Parkhurst v Smith*, Willes, 327, *Pearsall v Somerset*, 4 Taunt 593, *Payler v Homersham*, 4 M & S 432, *Ringer v Cann*, 3 M & W 343, *Solly v Forbes*, 2 Br & B 38, *Londo v Londo*, 1 Beav 496, *Doe d Meyrick v Meyrick*, 2 Cr & J 223, *Cholmondeley v Chinton*, 2 J & W 1, *Walsh v Trevelion*, 15 Q B 733, *Hunt v White*, 27 L J Ch 326, *Denison v Holdday*, 28 L J Ex 25, *Hopkinson v Lush*, 12 W R 392, *Gray v Earl of Limerick*, 2 De G & Sm 370, *Childers v Eardley*, 28 Beav 648, *Danby v Coutts & Co*, 29 Ch. D 500,

Re De Ros, Hardwick v Wilmot, 31 Ch D 81, *Ex parte Dawes*, 17 Q B D 275

* Instances in which the operative part being sufficiently clear the recital has not been allowed to have the effect of controlling, may be found in the following authorities *Ingelby v Smith*, 10 Bing 84, *Bird v Lake*, 1 H & M 111, *Willoughby v Middleton*, 2 J & H 344, *Ramsden v Smith*, 2 Drew 298, *Hammond v Hammond*, 19 Beav 29, *Campbell v Barnbridge*, 14 Beav 222, *Young v Smith*, L R 1 Eq 180, *Dawes v. Trethwell*, 18 Ch D 354

(*i*) *Per Jessel*, M R, in *Dawes v Trethwell*, 18 Ch D 358, C A. See also *Bath and Mountagu's Case*, 3 Ch Ca 105, *Bailey v Lloyd*, 5 Russ 344, *Walsh v Trevelion*, 15 Q B 751, 19 L J Q B 458, *Hollday v Overton*, 14 Beav 467, *Young v Smith*, L R 1 Eq 183, *Howard v Earl of Shrewsbury*, L R 17 Eq 394

(*l*) *Exp. Young*, 4 Deac 185. See also *Exp. Glyn*, 1 M D & De G 29

Cases of operative words restricted by recital

* Cases where operative words not restricted

all powers and remedies, &c, it was held that the power of sale in the mortgage was exerciseable, notwithstanding the recital (*l*)

CHAPTER X

iv.—The first Testatum—Receipt Clauses, Covenants for Payment of Principal and Interest.—After the recitals, if any, follows the first witnessing part, which, according to the usual practice, is to the following effect, viz. :—That in consideration of the sum advanced by the mortgagee or mortgagees, the receipt of which is acknowledged, the mortgagor covenants with him or them for payment of the principal on a fixed day (usually six months after the date of the mortgage), with interest in the meantime, and further, that if the mortgage moneys shall not be paid on that day, the mortgagee will pay interest at the same rate on the principal moneys for the time being unpaid until payment thereof

Covenants for payment of principal and interest

Where trust money is lent on mortgage it is the usual practice that the mortgage deed should not disclose the existence of the trust, but should merely state that the advance is made out of moneys belonging to the trustees (naming them) on a joint account (*m*).

Advance by trustees

Formerly, it was usual that the receipt by the mortgagor of the money should be acknowledged by a clause in the operative part of the deed, and also by a memorandum of receipt indorsed on the receipt and signed by the mortgagor. The absence of such a memorandum has been held to raise suspicion, so as to put a purchaser on inquiry as to whether any and what money had actually passed (*n*). And a transferee of a mortgage who had no notice that the mortgagor had not received the full amount of the advance was held to be entitled to rely on the acknowledgment in the body of the deed, and on the receipt indorsed thereon, which were for the full amount, and that the accounts must be taken on the footing that such amount had actually been advanced (*o*).

Effect of receipt clause

Neither a receipt clause in the body of a deed, nor an indorsed memorandum of receipt, was, however, conclusive in equity so as to exclude evidence that the money was in fact not received (*p*).

Receipt not conclusive in equity

(*l*) *Boyd v. Petrie*, L R 7 Ch A. 385

(*m*) See as to this, *post*, Chap XXIX pp 533 *et seq*

(*n*) *Kennedy v Green*, 3 My & K 699 See also *Greenslade v Daise*, 30 Beav 284

(*o*) *Buckerton v Walker*, 31 Ch D 151 See also *Gordon v James*, 30 Ch D 249

(*p*) *Coppin v. Coppin*, 2 P Wms 291, *Winter v Lord Anson*, 3 Russ 488.

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So also it may be shown that part of the money was returned (*g*).

With regard to deeds executed after the 31st December, 1881, the Conveyancing and Law of Property Act, 1881, enacts as follows:—

Receipt in deed sufficient

54—(1) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed

(2) This section applies only to deeds executed after the commencement of this Act.

Receipt in deed or indorsed evidence for subsequent purchaser

55—(1) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof

(2) This section applies only to deeds executed after the commencement of the Act

Receipt in deed or indorsed authority for payment to solicitor.

56.—(1) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be a sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt (*r*)

This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

Receipt by trustee

By the Trustee Act, 1893 (*s*), the receipt in writing of trustees for moneys payable to them under any trust or power is a sufficient discharge for same, and exonerates the person so paying from seeing to the application thereof (*s*)

Receipt where money is advanced to tenant for life under S. L. Acts

Where a tenant for life borrows money for enfranchisement, or for equality of exchange or partition under the Settled Land Act, 1882 (*t*), or for the purpose of discharging an incumbrance on the settled land under the Settled Land Act, 1890 (*u*), the money raised is capital money arising under the Acts; and, accordingly, the money, unless paid into Court, should be paid

(*g*) *Baker v Dewey*, 1 B & C 704

(*r*) The solicitor who produces the deed must be acting for the person who has signed the receipt, and be specially authorized to receive the money, and he must actually produce the deed. *Day v Woolwich Equitable Building Society*, 40 Ch D 491, *Re*

Helling and Merton's Contract, (1893) 3 Ch 269, C A

(*s*) 56 & 57 Vict c 53, s 20, re-enacting the similar provision in the repealed 44 & 45 Vict c 41, s 36

(*t*) *Ibid* s 13

(*u*) 53 & 54 Vict. c 69, s. 11

to the trustees of the settlement, whose receipt in writing will be a sufficient discharge to the mortgagee so paying the money (x).

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By the Trustee Act, 1893 (y), a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money receivable by the trustee under the trust, by permitting the solicitor to have the custody of and produce a deed containing any such receipt as is referred to in s 56 of the Conveyancing and Law of Property Act, 1881 (z), and a trustee shall not be chargeable for breach of trust by reason only of his having made, or concurred in making, such appointment; and the producing of any such deed by the solicitor is to have the same validity under the said section as if the person appointing a solicitor had not been a trustee. This section applies only where the money is received after the 24th of December, 1888.

Power of trustees to authorize receipt of money by solicitor

It has been seen that the covenants for payment of principal and interest on the day fixed is of the nature of a collateral security, and not an essential part of the mortgage security (a). Such covenants are, indeed, sometimes omitted; but if it is intended that the mortgagor should not be personally liable for payment of the mortgage moneys, a proviso expressly including such liability should be inserted in the deed.

Covenants for payment of principal and interest.

Where a covenant stipulates for payment of principal and interest on a fixed day, they are distinct debts, and may be sued for separately. Where the recitals in a mortgage contained an agreement for interest, but there was no provision as to payment of interest in the other parts of the deed, interest was nevertheless recoverable (b).

It is usual and prudent to have a distinct and separate covenant for payment of interest, if the principal is not paid on the day appointed, so as to prevent any doubt as to the power of the mortgagee to sue for the interest apart from the principal; though it would appear that such separate covenant is not absolutely necessary for this purpose (c). The operation of

(x) 45 & 46 Vict c. 38, s 40.

(y) 56 & 57 Vict c. 53, s 17, re-enacting the similar provision contained in the repealed Trustee Act, 1888 (51 & 52 Vict c 59), s 2. See *Re Hethng and Merton's Contract*, (1893) 3 Ch 269, C A

(z) *Supra*.

(a) See *ante*, p. 1.

(b) *Dickenson v. Harrison*, 4 Pri 282

(c) *Dickenson v. Harrison*, 4 Pri 282, *Attwood v Taylor*, 1 Man & G 279 307

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these covenants, and the remedies of mortgagees thereunder, will be considered in a later part of this treatise (*d*).

Form of
conveyance
in mortgage
deeds

v.—The Second Testatum.—The Conveyance—Next after the covenants for payment of principal and interest will come a further witnessing part, whereby the property intended to be mortgaged is conveyed to the mortgagee subject to a proviso for redemption. If several kinds of property are included in the same mortgage deed, as freeholds, copyholds, and leaseholds, or a life interest in real or personal estate, and a policy of assurance on the life of the mortgagor, it will be generally advisable to convey each kind of property by a separate witnessing part, employing in each case the appropriate word of conveyance, such as “grant,” “covenant to surrender,” or “assign,” according as the property is freehold, copyhold, or personalty (including leaseholds); the use of such technical words, however, is not essential, and, by the Conveyancing and Law of Property Act, 1881 (*e*), the word “convey,” will effect a valid and sufficient assurance by way of mortgage of any property

Conveyance
“as beneficial
owner,” &c

The mortgagor, if beneficially entitled to the property, should be made to convey “as beneficial owner,” so as to import the full statutory covenants for title; or, if he is a trustee raising money for portions or other purposes of his trust, he should be made to convey “as trustee,” so as to import the statutory covenant that he has not incumbered (*f*).

Description
of mortgaged
property

vi.—The Parcels.—Immediately after the operative words and the mention of the grantee, follows the description of the property intended to be conveyed; this description is technically called “the parcels”

The parcels should be fully and particularly described either in the witnessing part of the deed, or by reference to a description given in a schedule in order to identify the property; the situation, boundaries, occupation, dimensions, and distinctive name, if any, should be fully and accurately set forth. In respect to all these matters, it is important to avoid mistakes (*g*).

Care should also be taken to define clearly the nature and extent of the estate or interest intended to be conveyed Where

(*d*) *Post*, Chap XLVII. pp 959 *et seq*

(*e*) 44 & 45 Vict c 41, s. 2 (*v*)

(*f*) *Ibid.* s. 7. See *post*, pp. 141 *et seq*

(*g*) *Lambe v Reaston*, 5 Taunt 207, *Wootesley v Adams*, Flow. 191. See *Rorke v Errington*, 7 H L C 617, *Jack v McIntyre*, 12 Cl & F 151, *Francis v Hayward*, 22 Ch D 181.

a tenant for life of an entire estate and a remainderman, who was supposed to be entitled to a moiety subject to the life interest, joined in mortgaging the undivided moiety of the estate, and, in fact, the share of the remainderman was only a fifth, it was held that only one-fifth of the interest of the tenant for life passed, though the mortgage was intended to secure a debt due from both the mortgagors (*h*).

The mode of describing the parcels according to the nature of the property and the legal significance of the terms used in describing property, will be found discussed in other works (*i*).

The question of "parcel or no parcel" is for the jury, but the judge is bound to explain to the jury, for their guidance, what is the true construction of any documents necessary for the decision of this question (*j*).

"Parcel or no parcel"

A mortgage of land, unless the contrary appears, will comprehend not only the ground or soil, but also water covering its surface, mines and minerals thereunder, timber and trees growing thereon, and houses and buildings standing or subsequently erected upon it (*k*). If mines and minerals are not intended to be included in a mortgage because the mortgagor is not the owner thereof, or for any other reason, they should be expressly excepted from the conveyance. A mine or quarry opened by the mortgagor subsequently to the mortgage will enure for the benefit of the mortgagee (*l*).

What passes by a mortgage of land

Where lands or buildings used for the purpose of a trade or business are conveyed, by way of mortgage, without any express mention of the trade or business in the description of the parcels, the question whether such trade or business is included in the security will depend on whether its nature is such that a grant of the right to carry it on is necessarily involved in a conveyance of the land or buildings, so that the parties to the conveyance must have intended the right to pass.

Trade or business conducted on mortgaged premises

So a mortgage of land, mines, beds and seams of coal, and other the premises comprised in a lease referred to, but making no mention of the business or goodwill of the colliery, was held to include the colliery business, and the right to work the mines (*m*).

Mines

(*h*) *Grievson v Kirsopp*, 5 Beav. 283

(*i*) *Dart & Barber, Vendors & Purchasers*, Vol I pp 602 *et seq*, *Dev Conv* Vol I pt 1 pp 82 *et seq*, *Byth & Jarm Conv* (4th ed), Vol V pp 164 *et seq*

(*j*) *Turner v Dohenson*, 3 Cl & F 594, *Lyle v. Richards*, L R 1 H L 222.

(*k*) *Co Lit* 4 a., *Cooke v Yates*, 4 Bing 90, *Ewer v Haydon*, Cro Eliz 476, *Luttrell's Case*, 4 Rep 87 b, *Canham v Fisk*, 2 Cr & J 126

(*l*) *Elias v Snowden Slate Quarries Co*, 4 App Cas 454

(*m*) *County of Gloucester Bank v Ruddle, Merthyr, &c Colliery Co*, (1895) 1 Ch 629, C. A.

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Hotel

On the other hand, where an hotel keeper, in 1888, having an agreement for a lease of land on which he was about to build, mortgaged "the said building agreement, and all the premises comprised therein, and the hotel and buildings to be hereafter erected as aforesaid, and the lease so to be granted as aforesaid," it was held that the security did not comprise the business (*n*)

Goodwill.

Upon a mortgage of a business, the goodwill is included in the security (*o*); but it would seem that if the business were to be sold under an order of the Court (*p*), or under the mortgagee's power of sale (*q*), the mortgagor would not be prevented from setting up a similar business (*r*).

The goodwill, however, of trade premises does not pass to a mortgagee where it depends on the personal skill of the owner (*s*).

Public-house
licence

The mortgage of a public-house and the goodwill carries with it the right to the licence (*t*). But the mortgagee is not entitled to the produce of the sale of a new spirit licence obtained by the mortgagor after the former licence which was included in the mortgage has been forfeited; especially if the mortgagee has previously sold the premises under the power of sale in the deed (*u*)

General
words

vii.—General Words.—After the description of the parcels it was the invariable practice to add a clause, commonly called the "general words," by which the grantor purported to include in his grant all those parts, or subsidiary members, of the property which were not usually described with minute accuracy in the parcels, and also all easements, rights and liberties, which belonged to him at the date of the grant, as appurtenant to the property granted

Effect of ge-
neral words.

General words have in many cases been held to pass what without them might not pass by the deed, that is to say, the clause has been held to operate to grant more than the law would otherwise give (*x*)

Nothing, however, will pass by the general words which would not pass by the grant unless it is intended in the strict meaning of the terms used (*y*)

(*n*) *Whitley v Challes*, (1892) 1 Ch 64, C A

(*o*) *Chissum v Deves*, 5 Russ 29, *King v Midland R Co*, 17 W R 113, *Exp Lambton*, 3 Ch D 36, C A, *Exp Punnett*, 16 Ch D 226, C A

(*p*) See post, pp 1035 et seq

(*q*) See post, pp 886 et seq

(*r*) *Walker v Mottram*, 19 Ch D 355, C A. See *Trego v. Hunt*, (1896) A C 7

(*s*) *Cooper v. Metropolitan Board of*

Works, 25 Ch D 472, C A

(*t*) *Rutter v Daniel*, 30 W R 801, C A, *Gairrett v JJ of Middlesex*, 12 Q B D 620

(*u*) *Manifold v Morris*, 5 Bing N C 420, *Exp. Reid*, 1 D & C. 250

(*x*) *Barley v Great Western Rail Co*, 26 Ch D at p 444

(*y*) *Barlow v Rhodes*, 1 Cr & M 439, *Morris v Edgvington*, 3 Taunt 24, *Kooystra v Lucas*, 5 B & Ad 830

General words will pass only that which the grantee had to give at the date of the grant, and will not extend to anything he may subsequently acquire (z). In other words, this clause will work no estoppel.

The practice of inserting general words in purchase deeds and mortgages is now generally rendered unnecessary by the 6th section of the Conveyancing and Law of Property Act, 1881 (a), by which it is enacted as follows.—

General words
now usually
omitted.

6—(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof

General words
in convey-
ances of land,
buildings, or
manor

(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

(3) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seek, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any

(z) *Booth v Alcock*, L. R. 8 Ch. A. D 317
663 See *Beddington v Atlee*, 35 Ch. (a) 44 & 45 Vict c 41.

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property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties

(6) This section applies only to conveyances made after the commencement of this Act

Estate clause

By sect 63 of the same Act, a conveyance made after the commencement of the Act passes all the estate, &c, of the conveying party in the property conveyed, where a contrary intention is not expressed. The insertion of an "estate clause" in a mortgage is thus rendered superfluous and unnecessary.

Generally all fixtures attached to soil pass to mortgagee

viii.—What Fixtures, &c. pass to the Mortgagee.—Fixtures annexed to the freehold will pass to the mortgagee without being named, unless excluded expressly, or by inference (*b*); and in some cases chattels have been held so to pass, although fixed slightly, and for mere convenience (*c*).

There is no difference in this respect between a mortgage in fee and a mortgage of leaseholds (*d*), or whether the security be a memorandum of deposit of title deeds of freeholds (*e*), or other equitable mortgage (*f*), or a deposit of a lease (*g*), and whether the fixtures are trade fixtures or not (*h*), or tenant's fixtures (*i*); and the mortgage was held to attach to the produce of the fixtures after the lease had expired (*k*).

Sale of fixtures under power

Under a power in a mortgage to sell the land, either together or in parcels, fixtures cannot be sold separately (*l*); and the same rule would apply to a sale by a mortgagee under the

(*b*) *Hare v Horton*, 5 B & Ad 715, *Longstaff v Meagoe*, 2 A & E 167, *Hickman v Walton*, 4 M & W 416, *Waterfall v Penstone*, 6 E & B 876, *Mather v Fraser*, 2 K & J 536, 2 Jur N S 900, *Holland v Hodgson*, L R 7 C P 328. And see *Colegrave v Dias Santos*, 2 B & Cr 77.

(*c*) *Ibid*, and *Exp Barclay*, 5 De G M & G 413. Not agreeing with the dicta in *Trappes v Hatten*, 2 Cr & M 177, and *Hellaucell v Eastwood*, 6 Exch 313.

(*d*) *Meux v Jacobs*, L R 7 H L 481, *Mather v Fraser*, 2 K & J 536, *Longstaff v Meagoe*, 2 A & E 167.

(*e*) *Exp Price*, 2 M D & De G 518, *Exp Tagart*, De G 531, *Longbottom v Berry*, L R 5 Q B 123, *Exp Heathcoat*, Fomb Bky 208.

(*f*) *Exp Ldwards*, Fomb Bky 42, *Exp Heathcoat*, Fomb Bky 208, *Tebb v Hodge*, L R 5 C P 73, *Exp Couell*, 12 Jur 411, 17 L J Bky N S 16, *Williams v. Evans*, 23 Beav 239.

(*g*) *Meux v Jacobs*, L R 7 H L 481, *Exp Broadwood*, 1 M D & De G 631, *Exp King*, 1 M D & De G 119, *Williams v Evans*, *sup*. See *Exp Lusty*, 60 L T 160, 37 W R 304.

(*h*) *Longbottom v Berry*, L R 5 Q B 123, *Exp Barclay*, 5 De G M & G 413; *Mather v Fraser*, 2 K & J 536, *Walmsley v Milne*, 7 C B N S 115, *Re Head*, 12 W R 215. But see *infra*.

(*i*) *Exp Loyd*, 3 D & C 765, *Exp Beniley*, 2 M D & De G 591, *Exp Broadwood*, *sup*, *Exp King*, 1 M D & De G 119, *Exp Tagart*, De G 531, *Exp Couell*, 12 Jur 411, *Exp Chuck*, 13 Jur 531, *Williams v Evans*, *sup*, *Fearnside v Denham*, 13 L J Ch 354, *London Discount Co v Drake*, 6 C B N S 798.

(*k*) *Fearnside v Denham*, *sup*.

(*l*) *Exp Barclay*, L R 9 Ch A 576, explained *Exp Brown*, 9 Ch D 390, C A.

statutory power (*m*). If a special power is inserted in a mortgage for the mortgagee to remove and sell the fixtures apart from the land, the instrument will fall within the mischief of the Bills of Sale Acts (*n*).

In the case of a mortgage of leaseholds the tenant's fixtures, which as against the freehold reversioner the lessees would be entitled to remove, will pass to the mortgagee (*o*). When the mortgage is by way of sub-demise, the mortgagee has no right to remove such fixtures, unless an intention to that effect appears by the deed, nor can the mortgagor remove them during the mortgage term, but he still retains the right to remove them which he may exercise so soon as the mortgage is satisfied (*p*); but where the mortgagor surrendered the term and took a new lease from his landlord, it was held that the mortgagee was entitled to enter and sever the fixtures, as it was not competent for the mortgagor to defeat the security by a subsequent surrender of the term (*q*).

As a general rule, fixtures attached to the premises subsequently to the mortgage are included in the mortgage, whether it be in fee (*r*), or of leaseholds (*s*); and whether by deed or mere deposit of title deeds (*s*), or in an equitable mortgage (*t*); and whether of freeholds (*r*) or leaseholds (*u*), and whether tenant's fixtures or not (*x*); and where the fixtures are put up by the mortgagor and his partner (*y*); and although the mortgagor is tenant to the mortgagee under an attornment clause (*z*).

The word "fixtures," though used by some legal writers to express different meanings, may be here defined as meaning chattels which were originally moveable, but which having been annexed to the soil have ceased to be removeable therefrom, and have become part of the freehold; by the expression "annexed"

Tenant's
fixtures

Fixtures
attached after
mortgage

Definition of
"fixtures"

(*m*) 44 & 45 Vict c 41, s 19

(*n*) See *post*, p 204

(*o*) *Exp Barclay*, 5 De G M & G 413, *Meux v Jacobs*, L R 7 H L 481, *Southport & West Lancs Banking Co v Thompson*, 37 Ch D 64, C A

(*p*) *Southport & West Lancs Banking Co v Thompson*, *sup*

(*q*) *London & Westminster Loan and Discount Co v Drake*, 5 Ju N S 1407

(*r*) *Cullwark v Swindell*, L R 3 Eq 249, *Chmme v Wood*, L R 3 Ex 257, L R 4 Ex 328, *Meux v Jacobs*, L R 7 H L 481, *Walmsley v Milne*, 7 C B, N S 115, which are not con-

sistent with *Hellawell v Lastwood*, 6 Exch 313, and *Waterfall v Pemstone*, 6 E & B 876

(*s*) *Meux v Jacobs*, *sup*, *Elliott v Bishop*, 10 Exch 49

(*t*) *Exp Cotton*, 2 M D & De G 725, *Exp Reynal*, 2 M D & De G 443, *Exp Price*, 2 M D & De G 518

(*u*) *Meux v Jacobs*, *sup*

(*x*) *Exp Reynal*, *sup*, *McCluney v Lemon*, Hayes, 154, *Achroyd v Mitchell*, 3 L T N S 236 But see *post*, p 126

(*y*) *Exp Cotton*, 2 M D & De G 725, *Exp Seawth*, 1 M D & De G 240, *Cullwark v Swindell*, L R 3 Eq 249

(*z*) *Exp Punnett*, 16 Ch D, 226, C A.

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is meant that a thing, which otherwise would be moveable, is either actually fixed in or fastened to the ground or is essentially part of or connected with something which is so fixed or fastened. The question as to what chattels are fixtures and what are removeable is not always easy to determine, and has been the subject of numerous reported decisions.

What chattels
are included
in the term

Generally speaking, subject to exceptions hereafter to be noticed (*a*), it may be laid down that anything is a fixture which is itself imbedded in the soil, or is so attached thereto or to any building or permanent erection thereon by cement, nails or other fastening, as not to be removeable without force (*b*).

So it has been said that, in the absence of contrary intention, expressed or to be implied, whatever is substantially part of a house, so that it could not be taken away without depriving the house of what was intended to be used with the building, should be considered as fixtures (*c*).

The following chattels, when imbedded in, or attached to, the soil, or essentially forming part of, or connected with, chattels so imbedded or attached, have been held to be fixtures — Steam engines and hammers (*d*), boilers (*e*), furnaces and cutters (*f*), coke oven, still, malt-mill, sleepers and rails of railways (*g*), tramway and steam crane (*h*), looms fixed by nails to plugs sunk into the floor (*i*), silk spinning machines resting by their own weight only on the ground, but attached by moveable bolts to iron rods fixed to mill-beams overhead (*k*), retorts, purifiers, and boilers in gasworks (*l*), engines and machinery, attached to a building by bolts and screws and removeable without injury (*m*), piles before a wharf in the river Thames (*n*), a wind-mill (*o*), cornices

(*a*) See *infra*, p 125 As to what articles are fixtures and what are removeable, and the extent and qualifications of the right to removal generally, see Amos & Ferard on Fixtures

(*b*) *Exp Moore and Robinson's Banking Co, Re Armytage*, 14 Ch D 379, at p. 386 And see *Rufford v Bishop*, 5 Russ 346

(*c*) *Per Pearson, J*, in *Smith v. Maelus*, 32 W R 459.

(*d*) *Metropolitan Counties Soc v Brown*, 26 Beav 454, *Walmsley v Milne*, 7 C B N S 115, *Exp Astbury*, L R 4 Ch A 630, *Coombs v Beaumont*, 5 B & Ad 72, *Thompson v Pettitt*, 10 Q B 101

(*e*) *Ibid*, *Hubbard v Bagshaw*, 4 Sim 328

(*f*) *Metropolitan Counties Soc v Brown*, *sup*; *Tottenham v. Swansea*

Zinc Ore Co, W N (1885) 69, 52 L T. 738

(*g*) *Turner v Cameron*, L R 5 Q B. 306

(*h*) *Exp Moore & Robinson's Banking Co*, 14 Ch D 379

(*i*) *Boyd v Shorrock*, L R 5 Eq 72, *Holland v Hodgson*, L R 7 C. P. 328

(*k*) *Haley v. Hammersley*, 3 De G & F & J 587

(*l*) *Reg v Inhabitants of Parish of Lee*, L R 1 Q B 241

(*m*) *Longbottom v Bury*, L R 5 Q B 123 See *Clunne v Wood*, L R 4 Ex 328, *Hobson v Gorringe*, (1897) 1 Ch 182, C A See further, as to trademachinery, *post*, p 205

(*n*) *Lancaster v Eve*, 5 C B N S. 717, *Martin v Roe*, 7 E & B 248

(*o*) *Steward v. Lombe*, 1 Br. & B. 506

and poles, and pier glasses in frames (*p*). Moveable parts of fixed machinery are fixtures, *e g.*, locks and keys of a house, millstones (*q*), anvil used with fixed steam hammer (*r*), driving-belts for working machinery (*s*), and gear necessary for working fixed looms (*t*).

The following are moveables:—

What chattels are not included.

Carpets attached with nails (*u*); looms (*x*), and weighing machines (*y*) deposited in holes or sockets; iron plates (*z*); hydraulic press not necessary for factory (*a*); mules used for spinning cotton, though fixed by screws (*b*); hangings and valances apart from cornices, and mantel-boards (*c*). And articles are moveables, although partly imbedded in the soil, when they have not been so placed with the intention to annex them thereto, as plates, sleepers, or rails which have accidentally penetrated the ground (*d*), so also chattels resting by their own weight only on foundations sunk into the ground (*e*)

So also tools and implements used in connection with machinery are not fixtures (*f*), nor are cooking utensils used in a restaurant (*g*)

Tools and utensils.

Fixtures attached to the land, or to the building which stands upon it, by the freeholder, according to the well-known maxim, *quicquid plantatur solo, solo cedit*, accordingly pass to the heir, and not to the executor, whether the owner acquired the land or building by descent or purchase, and whether he annexed them for a permanent purpose or for the better enjoyment of the land, or whether they are trade fixtures, or the fittings up of collieries, or the like, or not (*h*) In some cases a distinction has been made where articles have been annexed to the soil for

Fixtures attached for temporary purpose.

- (*p*) *Smith v Machine*, 32 W R 459
- (*q*) *Place v Fagg*, 4 Man & Ry 277,
- Mather v Fraser*, 2 K & J 559,
- Fisher v Dixon*, 12 Cl & F 312, *Cori*
- v Sagar*, 3 H & N 370, *Exp Astbury*,
- L R 4 Ch A 630
- (*r*) *Metropolitan Counties Soc v Brown*,
- 26 Beav 454, 5 Jur N S 378
- (*s*) *Sheffield, &c Building Soc v*
- Harrison*, 15 Q B D 358, O A
- (*t*) *Cori v Sagar*, 3 H & N 370
- (*u*) *Hellawell v Eastwood*, 6 Exch
- 295
- (*x*) *Hutchinson v Kay*, 23 Beav 413,
- Boyd v Shorrocks*, L R 5 Eq 72,
- Holland v Hodgson*, L R 7 C P 328,
- Cori v Sagar*, *sup*
- (*y*) *Exp Astbury*, L R 4 Ch. A.

630

- (*z*) *Metropolitan Counties Soc v Brown*,
- sup* And see *Exp Astbury*, *sup*
- (*a*) *Parsons v Hind*, 14 W R 860
- (*b*) *Hellawell v Eastwood*, *sup* But
- see *Longbottom v Berry*, L R 5 Q B
- 137, 138
- (*c*) *Smith v Machine*, 32 W R 459
- (*d*) *Bates v Duke of Beaufort*, 8 Jur.
- N S 270
- (*e*) *Mather v Fraser*, 2 K & J 559,
- Exp Newbery*, 10 L T N S 661,
- Bates v Duke of Beaufort*, *sup*
- (*f*) *Haley v Hammerley*, 3 De G F
- & J 522
- (*g*) *Re Macdonald*, W. N (1885) 98
- (*h*) *Fisher v Dixon*, 12 Cl & F 312,
- Mather v Fraser*, 2 K & J 549

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temporary convenience (*b*), or for ornament (*c*); but it would appear that the articles to which the executors were held to be entitled in these cases were only slightly attached to the freehold, and were hardly fixtures in the strict sense of the word. If the *corpus* of machinery belongs to the heir, all that belongs to such machinery, whether capable of being detached or not, passes to him (*d*)

Execution on fixtures

Fixtures annexed to the freehold are, as a general rule, not subject to be taken as goods and chattels under an execution (*e*).

When chattels are fixed to the freehold by a tenant, they become part of it, subject to the tenant's right to separate them during the term, and thus reconvert them into goods and chattels (*f*). And although annexed, they may be treated for some purposes as chattels; for instance, in the execution of a *fi. fa* against the tenant (*g*).

The term "fixtures" has thus acquired the peculiar but incorrect meaning of personal chattels which have been annexed to the freehold, but which are removeable at the will of the person who has annexed them (*h*), and against the will of the owner of the freehold.

Distress on fixtures

If the fixtures and machinery are slightly attached, it has been held that they are distrainable for rent (*i*), but, as a general rule, fixtures are not distrainable for rent (*l*).

Exclusion of mortgagee's right to fixtures by stipulation

If, however, it appears, expressly or by implication from the terms of the deed or the subsequent dealings between the parties, that the mortgagee's right to fixtures is intended to be excluded or qualified, effect will be given to such intention. So it may appear, expressly or by inference, that the mortgage is not intended to pass to the mortgagee machinery annexed to the land subsequently to the mortgage (*l*). Again, where the mortgage was of an iron-foundry and two dwelling-houses with the appurtenances, "together with all grates, boilers, bells and other fixtures in and about the said two dwelling-houses," it was held

(*b*) *Hellawell v Eastwood*, 6 Exch 295, *Elliot v Bishop*, 10 Exch 496, 508 But see *Exp Barclay*, 5 De G M & G 413

(*c*) *Harvey v Harvey*, Stra 1141, *Squier v Mayer*, Freem Ch 249

(*d*) *Fisher v Dixon*, 2 Cl & F 312, *Sheffield, &c Building Soc v Harrison*, 15 Q B D 358, C A

(*e*) *Wann v Ingleby*, 5 B & Ald 625

(*f*) *Lee v Risdon*, 7 Taunt 189,

Longbottom v Berry, L R 5 Q B 123

(*g*) *Poole's Case*, 1 Salk 368

(*h*) *Hallen v Runder*, 1 C M & R 276

(*i*) *Hellawell v Eastwood*, 6 Exch 295

(*k*) *Gibb Distr e 1, s u p 42*, *Darby v Harris*, 1 G & D 234, *Dalton v Whitem*, 3 Q B 961

(*l*) *Waterfall v Penstone*, 6 E & B 866.

that a steam-engine, machinery, and other fixtures in the foundry did not pass, though they would have passed if the fixtures in the dwelling-houses had not been specifically mentioned (*m*) But a specific enumeration of certain kinds of fixtures on the mortgage property will not necessarily raise an inference that other fixtures were not intended to pass (*n*) So a mortgage of a mill, with engines and certain specified machinery, and all other machinery "now or hereafter to be" on the lands, includes all machinery, although not *ejusdem generis* with the particulars specified (*o*).

If for any reason it is deemed necessary to refer to fixtures specifically, care should be taken to make the reference include all that are intended to pass. It will be advisable, therefore, in framing mortgages of property and fixtures, to specify in the deed, or in a schedule to it, the machinery intended to be comprised, so that no doubt can be raised, and especially to avoid that kind of imperfect specification which leads to the inference that what is not expressly included is intentionally excluded (*p*). A particular enumeration of fixtures in a deed or in a schedule to it does not bring the deed within the mischief of the Bills of Sale Acts (*q*).

Express mention of fixtures in deed

Trade fixtures passed under the word "appurtenances" (*r*).

As to what will pass in a mortgage of premises "with the fixed machinery and other matters and things erected and standing thereon," see *Trappes v Harter* (*s*).

The general rule that all fixtures which are at the time of the mortgage annexed to the land, or are subsequently brought upon it, pass to the mortgagee is subject to certain qualifications or exceptions in favour of mortgagors or third persons

Exceptions to general rule as to fixtures

Some of the decisions seem to indicate a desire to relax the rule to some extent in the case of trade fixtures brought on to the premises subsequently to the contract. Most of the cases in which the question has arisen have been decided as between landlord and tenant (*t*), but some have been decided as between

Trade fixtures attached after mortgage

(*m*) *Han v Horton*, 5 B & Ad 715

(*n*) *Mather v Fraser*, 2 K & J 559

(*o*) *Haley v Hammersley*, 3 De G F & J 592, *Exp Acton*, 4 L T N S 261 See *Wilson v Whateley*, 7 Jur N S 908

(*p*) See Dav Conv Vol II pt 1 185, 186, Byth & Jarm Conv (4th ed) Vol V p 196

(*q*) See *post*, p 206

(*r*) *Exp Bentley*, 2 M. D & De G 591

(*s*) 2 Cr. & M 153

(*t*) See, *e g*, *Poole's Case*, 1 Salk 368, *Lawton v Salmon*, 1 H Bl 259, *n*, *Earl of Mansfield v Blackburn*, 6 Bing N C 426, *Dean v Allaley*, 3 Esp 11, *Penton v Robert*, 2 East, 90, *Trappes v Harter*, 2 Cr & M 153

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the heirs and executors of deceased freeholders, and, generally, the principles of the decisions in the last-mentioned class of cases seem to apply to conflicting claims between mortgagors and mortgagees of land (*u*).

So a cider mill let into the ground, and a fire engine set up for the benefit of a colliery, have been held to pass to the executor (*x*). And, in one case, a very slight indication of intention appears to have been seized upon in order to exclude from the security trade machinery placed upon the land by the mortgagor after the date of the deed (*y*). But in a later case, in which it was held that fixtures annexed to the mortgaged freehold subsequently to the mortgage for the convenience and better enjoyment of the estate, passed to the mortgagee, it was laid down that the rules as to the right of a tenant to remove trade fixtures set up by him during the term, have no application to cases between mortgagor and mortgagee (*z*).

The protection accorded to trade fixtures as between landlord and tenant will, however, apply so as to prevent such fixtures placed upon the mortgaged land by a tenant of the mortgagor from passing to the mortgagee. If the fixtures are on the land at the time of the mortgage, it is clear that the mortgagor cannot pass to the mortgagee any greater right to them as against the tenant than he had himself. And where a mortgagor in possession let the mortgaged house to a tenant, who brought into it certain trade fixtures, and the mortgagee subsequently entered into possession, it was held that the fixtures did not belong to the mortgagee, but remained the property of the tenant (*a*).

Moreover, so long as a mortgagor who is engaged in trade or business remains in possession, he must be deemed to be authorized by the mortgagee to enter into any contracts which are necessary or convenient for carrying on such trade or business in its ordinary course; and the mortgagee will be bound by such contract, though involving the right of a third person to remove chattels which would otherwise pass as fixtures to the mortgagee.

So, where mortgagors in possession of a colliery which they

(*u*) See *Colegrave v. Dias Santos*, 2 B & Cr 76

(*x*) *Lawton v. Lawton*, 3 Atk 13

(*y*) *Waterfall v. Pemstone*, 6 E & B 876.

(*z*) *Walmesley v. Milne*, 7 C B N. S. 115 See *Mather v. Fraser*, 2 K & J. 536.

(*a*) *Sanders v. Davis*, 15 Q. B. D. 218.

had mortgaged put up certain machinery under a hire and purchase agreement, it was held that the vendors were entitled to remove such machinery (*b*).

So, also, where a lessee of a nursery garden mortgaged the same, and afterwards, while in possession of the mortgaged premises, obtained from a firm of engineers, under a hire and purchase-agreement, a boiler and hot water pipes and fittings for the purpose of his trade which were fixed in the brick-work of a hot-house, part of the mortgaged premises, it was held that the mortgagee, having allowed the mortgagor to remain in possession, must be taken to have acquiesced in his making agreements for fixing and removing fixtures for the purposes of his trade, and that he could not claim the boiler, pipes, and fittings as against the firm who had removed them on default in payment of an instalment of the purchase-money (*c*).

But the protection afforded to trade fixtures, as between the mortgagee and the mortgagor and persons claiming under him, rests entirely on the presumption that the mortgagee must be taken to have assented to the removal of the fixtures by the mortgagor as being necessary for the conduct of his trade or business in its ordinary course; and accordingly no protection will be afforded to the mortgagor if he removes such fixtures not in the ordinary course of his trade or business, but for the purpose of preventing the mortgagee from claiming them (*d*).

The protection accorded to trade fixtures as between landlord and tenant has been held not to apply to buildings and fixtures erected or annexed for agricultural purposes (*e*). Agricultural
fixtures

The effect of the Agricultural Holdings Act, 1883 (*f*), is that the tenant of an agricultural or pastoral holding (including in that expression a market garden) may, with the consent of his landlord, execute upon the land any of the improvements mentioned in Part I of the schedule to the Act, which include buildings and other works, some of which may be regarded as fixtures; and that the tenant, on the expiration of his tenancy, is entitled to claim compensation from his landlord notwithstanding any agreement to the contrary.

It would seem clear that where agricultural or pastoral land

(*b*) *Cumberland Union Banking Co v. Maryport Hematite Iron and Steel Co*, (1892) 1 Ch 415. See *Hobson v Gorringe*, (1897) 1 Ch 182, O A.
(*c*) *Gough v Wood*, (1894) 1 Q. B. 713, C A.

(*d*) *Huddersfield Banking Co v Lister*, (1895) 2 Ch 273, O A.
(*e*) *Elwes v Maw*, 3 East, 38, see notes to S C in 2 Sm. L. O. (10th ed.) pp 183 *et seq*.
(*f*) 46 & 47 Vict c 61.

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is mortgaged, (i) the mortgagor, so long as he remains in possession, will be entitled, in the absence of any stipulation to the contrary, to lease or let the land subject to what the law has pronounced to be the ordinary incidents of tenancy, including the tenant's right to compensation; and (ii) that such improvements will pass to the mortgagee by virtue of his mortgage, but subject to his liability, on taking possession, to pay such compensation as the mortgagee would have been liable to pay

Removal of
fixtures.

A mortgagee, whether his security be in fee or for a term, may restrain the removal of valuable fixtures (g).

Though the mortgagee takes possession of the premises forcibly, and therefore illegally, trover for the fixtures will not lie (h).

Where a mortgagor-lessee becomes bankrupt and his trustee removes the fixtures, the mortgagee may sue the trustee for such removal, notwithstanding a covenant by the lessee to deliver up at the expiration of the term all fixtures belonging or to belong to the premises (i). And if the trustees in bankruptcy of a mortgagor who has mortgaged the lease of a house and the fixtures, sell the fixtures separately, they will be answerable for the sum which the fixtures would have fetched if sold with the house (l).

Fixtures are not chattels personal within the reputed ownership clause of the Bankruptcy Act (l). As fixtures are part of the soil itself no presumption of ownership arises with regard to them

Assignment
of fixtures
apart from
land

Fixtures, when assigned or charged separately from the land, are within the Bills of Sale Acts (m), and accordingly no mortgage thereof will be valid unless in conformity with the statutory form and duly registered. But fixtures (except trade machinery as defined by the Bills of Sale Act, 1878), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, are not within the Acts (n).

Usual form
of proviso

ix.—Proviso for Redemption.—In mortgages of freeholds, and also generally in mortgages of leaseholds, the old form of proviso

(g) *Ackroyd v. Mitchell*, 3 L T N S

409

236 (h) *Longstaffe v. Meagoe*, 2 A & E

(h) *Thompson v. Pettitt*, 10 Q B 101

187, *Minshall v. Lloyd*, 2 M & W

(i) See *post*, p 178

450

(j) *Hutchman v. Walton*, 4 M. & W

(m) 41 & 42 Vict c 31, 45 & 46

Vict c 43

(n) See *post*, p 206

for redemption and for avoidance of the mortgage or cesser of the term upon such redemption, has been superseded by a form which is in effect a proviso for reconveyance, if the mortgagor should pay the principal debt and interest at the specified time, usually six months after the date of the mortgage.

If money is to be lent on mortgage in distinct sums by different mortgagees, or sets of mortgagees, who are to be paid *pari passu*, the object may be effected by conveying the land to all the mortgagees, with a proviso for redemption on payment of the mortgage debts and interest to the several lenders, the mortgagor covenanting separately with the different mortgagees for payment of their respective debts and interest; but it is usual to make the mortgage to trustees for the entire sum, the interest of the several lenders being ascertained either by a separate deed or on the face of the mortgage (o)

Contributory mortgage

X.—Proviso for Reduction of Interest on Punctual Payment — A clause is not infrequently inserted in mortgage deeds providing for the reduction of the rate of interest on punctual payment, and such a provision may be of service in causing the interest to be regularly and punctually paid (p). The legality of such a clause may be regarded as established (q); but an agreement that the rate of interest shall be raised if interest at the normal rate be not punctually paid, is regarded, in equity, as being of the nature of a penalty, and to be relieved against even in case of gross default (r)

Legality and advantage of such provisos

If any condition as to time or otherwise is attached to a proviso for reduction of interest, such condition, unless waived, must be strictly performed (s)

Condition to be strictly observed

But a single default in punctual payment of interest will not utterly defeat an agreement for the reduction of interest, unless

Effect of single default

(o) See Davidson's Conveyancing (4th ed.), Vol II, p. 11 p. 385, Bythewood and Jarman's Conveyancing (4th ed.), Vol III, p. 1055, n.

(p) It may be suggested that it will generally be advisable that the difference between the rates of interest should be great enough to offer a material inducement to the mortgagor to pay punctually, but not so great as to render the mortgagee liable to appeals *ad misericordiam* asking him, notwithstanding default, to accept interest at the lower rate, which it might be difficult to resist without the imputa-

tion of harshness

(q) *Jory v Cox*, Prec. Ch. 160, *Nicholls v Maynard*, 3 Atk. 519, *Wayne v Lewis*, 25 L. T. 264. See *Seton v Slade*, 7 Ves. 293, *Wallingford v Mutual, &c. Soc.*, 5 App. Cas. 685, 702.

(r) *Ladu Holles v Wyse*, 3 Vern. 289, *Strode v Parker*, 2 Vern. 316, *Jory v Cox*, *sup.*, *Nicholls v Maynard*, *sup.*, *Walmsley v Booth*, Barn. Ch. R. 475, *Burton v Slattery*, 5 Bro. P. C. 233.

(s) *Bonafous v Rybot*, 3 Burr. 1375. See *Attwood v Taylor*, 1 Man. & Gr. 279.

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this intention clearly appears from the language of the clause. Thus in *Stanhope v Manners* (t), in which the agreement was "as often as" the interest should be paid half-yearly on the days appointed, or within three months next after, so much should be deducted as would make the interest three and a half per cent. The first half-year's interest was not paid within the time. The tender of the second half-year's interest (at three and a half per cent) was made within the limited period, but was refused on the ground that the default made in the first half-year defeated and annihilated the agreement. Lord Nottingham thought otherwise, and said that words could not be stronger to express the intent of the parties, that in every instance where the three and a half per cent was tendered in time, it should be accepted, and decreed accordingly.

Waiver of condition by trustee

A trustee is justified in accepting interest at the lower rate, after the higher rate fixed by the mortgage has become payable by the strict terms of the contract (u).

Parol agreement.

A parol agreement for the reduction of interest secured by a mortgage deed is binding (x).

Presumption of agreement

An agreement for the reduction of interest on punctual payment was not presumed, where interest had in fact been for many years received at a lower rate than that reserved by the mortgage deed, against a subsequent tenant for life of the interest, who was not shown to have agreed to take less than interest at the reserved rate (y).

Mortgagee in possession entitled to interest at the higher rate.

A mortgagee in possession through the default of the mortgagor is entitled to the higher rate (z). So also, where the mortgagee has entered into possession by arrangement with the mortgagor, though no interest was in arrear at the time of taking possession (a).

But where mortgagees assented to an order for payment out of a fund in Court, and, owing to delay in the completion of the order, the interest was not paid within the time limited for payment at the reduced rate, it was held that the mortgagees must nevertheless accept interest at the reduced rate (b).

Covenant for payment of interest at increased rate.

An exception to the rule that the rate of interest shall not be raised if not punctually paid has been said in an old case to

(t) 2 Ed. 199

(u) *Booth v Alington*, 3 Jur. N. S.

(x) *Lord Milton v Edgworth*, 5 Bro. P. C. 313

(y) *Gregory v. Pilkington*, 8 De G. M. & G. 616.

(z) *Union Bank of London v Ingram*, 16 Ch. D. 53, *Cockburn v Edwards*, 18 Ch. D. 449

(a) *Bright v Campbell*, 41 Ch. D. 388

(b) *Re Moss, Levy v Sewill*, 31 Ch. D. 90.

exist, where there is a direct covenant for payment of the increased rate in that event (c) But this decision may be regarded as overruled by the subsequent authorities (d)

It would seem, however, that an exception to the rule must be made in case the increased rate of interest does not constitute part of the original mortgage contract, but is the result of subsequent and independent agreement in consideration of, and compensation for, forbearance on the part of the mortgagee; in which case, if the compensation be reasonable, the Court will not interfere (e) In a modern case (f), such a stipulation was enforced as against a second mortgagee until notice that his interest was in arrear. And payment has been enforced of interest at an increased rate on purchase-money on default of payment of the money on a specified day (g)

Subsequent agreement in consideration of forbearance

xi.—Proviso for Capitalization of Interest—It was formerly considered in equity that, as a general rule, provisos in mortgage deeds or collateral agreements, entered into at the time of the loan, for converting interest into principal from time to time as it should become due, were oppressive and unjust, and tended to usury, and, consequently, could not be supported (h). As was remarked by Lord Eldon (i), “There is nothing unfair, or perhaps illegal, in taking a covenant originally, that, if interest is not paid at the end of the year, it shall be converted into principal; but this Court will not permit that, as tending to usury, though it is not usury.”

Former rule in equity.

At the present day it seems to be a very generally received opinion that, in the absence of fraud or oppression, stipulations entered into at the time of the loan for payment of compound interest would be valid, on the ground that the rule against compound interest depended wholly on its being regarded as contravening the policy, if not the letter, of the

As to validity of such provisos at the present day

(c) *Margus of Halifax v Higgins*, 2 Vern 134. It is stated in *Freec Ch* that the agreement was in a separate deed see also 15 Vin Abr 453, *Powell on Mortgages*, 963, but it is submitted that this circumstance could make no difference, as the two deeds must be considered as forming one transaction

(d) *Burton v Slattery*, 5 Bro P C 233. See also *Stanhope v Manners*, 2 Ed 199, n

(e) *Brown v Barkam*, 1 P Wms 652. See *Burton v Slattery*, *sup*

(f) *Law v Glenn*, L R 2 Ch A 634

(g) *Herbert v Salisbury, &c Rail Co*, L R 2 Eq 221

(h) *Broadway v Mosely*, 248, *Mitford v Featherstonehaugh*, 2 Ves S 445, *Sir Thomas Moore's Case*, cited in *Cas t Talb (Williams)* 40, *Lord Ossulston v Lord Yarmouth*, 2 Salk 449, *Chambers v Goldwin*, 9 Ves. 254. And see *Page v Broom*, 4 Cl & F 437

(i) *Chambers v Goldwin*, 9 Ves 254, at p 271

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usury laws, and that accordingly the repeal of the usury laws in 1854 (*l*) has virtually abrogated the rule (*l*)

The cases cited by text-writers in support of this view do not appear to be absolutely conclusive, and it seems open to question whether a covenant in a mortgage deed, not being a mortgage of a reversionary interest, that interest in arrear should be capitalized by periodical rests, and thenceforth bear interest, might not even now, except under special circumstances, be rejected as being in itself oppressive and in the nature of a penalty, thereby giving a collateral advantage to the mortgagee and clogging the equity of redemption

Effect of
repeal of the
usury laws

There is no reported decision which expressly bears on this point. But it has been incidentally stated by several learned judges (*m*), that the rule of equity against allowing a mortgagee any collateral advantage beyond his principal, interest, and costs, is unimpaired by the repeal of the usury laws. So in a recent case (*n*), Sir E. Kay, L. J., in the course of his judgment, said that, before the repeal of the usury laws, it was well settled that collateral advantages could not be insisted on by a mortgagee; so that (amongst other things) a stipulation capitalizing interest, turning it into principal, and charging interest upon it, however formally expressed, was not allowed to prevail, and he pointed out that these rules of equity were forced on the mortgagee in exercise of the "paternal jurisdiction" of the Court, thus altering the contract between the mortgagor and mortgagee by disallowing those advantages for which the mortgagee had stipulated. His Lordship then cited and commented as follows on the judgment of Lord Eldon in *Chambers v. Goldwin* (*o*) above referred to: "Lord Eldon there, although no doubt one objection he makes to these exactions was that they tend to Harp, still does not rest his objection entirely upon that ground. a mortgagee, besides, that they are oppressive, and are exactions that a mortgagee is not allowed to make. It is a very interesting

(*l*) 17 &

(*l*) See *Dev. Vict. c. 90*
pp. 360, n., *Co. Conv. Vol. II. pt. n*
ed.), Vol. II., p. 1000. *Mortgages* (5th

(*m*) *Broad v. Selfe*, 6 Seton, 1609
Barnett v. Hartley, L. Jur. N. S. 885,
795, *James v. Kerr*, 40 R. 2 Eq. 789,
460, *Field v. Hopkins*, 44 Ch. D. 449,
530. See *Croft v. Graham*, 4 Ch. D. 524,
S. 155, 161, *Earl of Aylesford v. Morris*,

L. R. 8 Ch. A. 484

(*n*) *Mainland v. Upjohn*, 41 Ch. D.
126, 136, 138

(*o*) 9 Ves. 254, 271. See also *Su*
Thomas Mees's Case, cit. in *Cas. t*
Talb. (Williams) 40, *Le Grange v.*
Hamilton, 2 H. Bl. 144, *Barnard v.*
Young, 17 Ves. 47, *Leath v. Irvine*, 1
My & K 284, *Blackburn v. War-*
wick, 2 Y. & C. Ex. 92

question indeed, and one which I certainly do not consider is at present finally settled, how far the abolition of the laws against usury has affected this jurisdiction, or the extent to which the Court will exercise its jurisdiction, as between mortgagor and mortgagee."

It seems indeed somewhat difficult to distinguish upon principle provisions that, if any interest shall fall into arrear, it shall forthwith be capitalized and thenceforth bear interest, from covenants by the mortgagor to pay interest at a higher rate, if not paid within a specified time after it has accrued due; which latter covenants have, as has been seen (*p*), been invariably regarded as imposing a penalty on the mortgagor, which will be relieved against as clogging the equity of redemption

In one case, which has been much relied upon as affirming the general validity of covenants for compound interest, certain persons, entitled to interests in funds in Court subject to a prior life interest, executed a mortgage of such reversionary interests, which contained a covenant, expressed in general terms, to the effect that all interest which should accrue due during the continuance of the security, in case the same should not be paid within twenty-one days from the same becoming due, should be capitalized and bear interest, and also a proviso that the mortgagee should forbear payment of any principal or interest until the expiration of three years from the date of the mortgage, the reversion having fallen into possession, upon petition an inquiry was directed to ascertain the amount due on the mortgage, and on the question being adjourned into Court it was held that the covenant for compound interest was good (*q*)

Clarkson v Henderson

This decision does not appear altogether satisfactory or conclusive. Something may possibly have turned in that case upon the fact that it was a mortgage of a reversion (*r*); but it is to be remarked that the covenant did not limit the capitalization of interest to the period of three years or to the continuance of the prior particular estate; also that the learned Vice-Chancellor who decided the case did not give any grounds for his decision, so that it does not seem quite clear how far the principle of the decision extends. It will be observed that, in this case, the mortgagors obtained an important advantage by the provision that the mortgagee should not be entitled to call for payment of prin-

Remarks on this decision.

(*p*) *Ante*, p 129

(*q*) *Clarkson v Henderson*, 14 Ch D 348.

(*r*) *Per Kay, J*, in *Mantland v Upjohn*, 41 Ch D 126, at p 143. And see *inf*

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principal or interest for three years, during which time his remedies as mortgagee were suspended; and it seems fair and reasonable that, in such a case, the mortgagee should be allowed to stipulate for payment of interest which he is precluded from enjoying or rendering productive as it accrues due. But his Honour went further than this, and apparently allowed capitalization of interest up to the falling in of the reversion, thus giving to the mortgagee an advantage which was more than correlative to the restriction imposed upon him. The terms of the mortgage deed extended to the capitalization of all arrears of interest whenever accruing due during the continuance of the security, but it does not appear from the report whether any interest had fallen into arrear since the falling in of the reversion.

Distinction
where capitalization is
limited in
point of time
and in con-
sideration of
forbearance

It is obvious that there is an important distinction between allowing a mortgagee to capitalize interest during a term certain or determinable upon the happening of a certain event in consideration of his forbearance to require payment during that term, and allowing him to clog the equity of redemption without any corresponding advantage to the mortgagor by imposing upon the latter what, as is submitted, is in effect a penalty by way of compound interest, whenever interest may fall into arrear during the continuance of the security. And there appears to be no reported case which clearly affirms the validity of a stipulation to the latter effect.

Mortgages of
reversions

Mortgages of reversionary interests often contain covenants for capitalization of interest during the prior life interest, or for payment on the determination of such interest of an aggregate sum calculated on the footing of capitalization of interest, and its addition to the principal originally advanced, and also covenants for payment of simple interest thereafter, at a specified rate on the aggregate sum, with a corresponding proviso that the mortgagee shall not require payment of principal or interest pending the falling in of the reversion. Even before the repeal of the usury laws an exception to the general rule against compound interest appears to have been allowed in favour of mortgages of reversions. So in an old case it was held that a reservation of interest on interest in the mortgage deed during the prior life estate was not contrary to the usury laws, and ought to be supported in equity, as otherwise the mortgagee might be a great loser (*s*). And arrangements of

this nature have been allowed to pass without question when instruments embodying them have been brought before the Court (*t*)

Where a mortgage of a reversionary interest contained a covenant for capitalization of interest during the life of the tenant for life, and the mortgagor became bankrupt before the reversion fell in, it was held that the mortgagee was not entitled to prove in the bankruptcy for so much of the aggregate sum as represented capitalized interest accrued due after the adjudication (*u*)

Proof in bankruptcy for capitalized interest

A covenant or provision for the capitalization of interest will render void a bill of sale of chattels as being not in accordance with the form prescribed by the Bills of Sale Act, 1882 (*x*)

Avoidance of bill of sale

xii.—Provisions as to Postponement of Right to call in Principal—Instalments—Mortgage deeds sometimes contain a covenant or proviso that the mortgagee will not call in the mortgage money before a fixed date, or before the happening of a specified event, as for instance, the death of a named person

Covenant, &c not to call in principal.

Where a covenant to this effect is inserted in a mortgage deed, the forbearance is, according to the usual practice, made conditional upon the regular and punctual payment of the interest, unless capitalized, and upon the performance and observance by the mortgagor of the covenants and obligations on his part contained in or implied by the mortgage.

The security in these cases is usually so framed as to make the whole debt payable at an appointed, and not distant, date, with a proviso explaining the real intent of the parties for payment by instalments, or at a distant day if the payment is punctual (*y*).

Form of security in such cases

An unqualified agreement that the mortgagee will not call in the debt during the life of the mortgagor is binding, though the interest falls in arrear (*z*); but in settling such an agreement, the Court will insert a condition that the interest shall have been punctually paid, and, if leasehold, that the covenants have been performed (*a*)

Effect of proviso

A proviso that the principal shall not be called in for a certain

Proviso postponing redemption

(*t*) *Re Fane, Exp Hope*, W N (1888) 231, *Salt v Marquis of Northampton*, (1892) A C 1

(*u*) *Re Fane, Exp Hope, sup*

(*x*) *Davis v Burton*, 11 Q B D 537, C A., *Myers v Elliott*, 16 Q B

D. 526, C A. And see *post*, p 232

(*y*) *Dav Conv Vol II pt. II p 49*, *Byth & Jarm* (4th ed by Robbins) Vol III pp. 997, 1006

(*z*) *Burrowes v Molloy*, 2 J. & L 521

(*a*) *Seaton v Twyford*, L R 11 Eq 591

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period, or shall be payable by instalments, is generally accompanied by a corresponding covenant by the mortgagor that he will not compel receipt of the principal before the expiration of the period or the date when the last instalment becomes payable, and such a covenant is binding on the mortgagor (b).

But even in the absence of such a covenant by the mortgagor, the Court will not allow him to redeem before the day appointed for payment of the money has arrived (c) provided that the period fixed for calling in the money is not so excessive as to render the correlative postponement of the mortgagor's right to redeem oppressive to him, as where the principal was made repayable in twenty years (d).

Where a second mortgage contains a covenant not to call in the principal for a fixed period, the second mortgagee will be precluded, until the expiration of that period, from redeeming the first mortgage and getting in the legal estate (e).

Condition
strictly
enforced

There is no equitable relief under a proviso not to call in a mortgage debt on punctual payment of interest, if such payment falls into arrear even for a few days only (f).

Giving time
after default
no waiver.

If, after default, interest is tendered and accepted, the mortgagee does not thereby waive his right to call in the principal (g).

The case of *Langridge v. Payne* (h) has been erroneously supposed (i) to lay down a rule that if a mortgagee, on default in payment of interest, demands and receives payment of the interest due together with his costs, this will amount to a waiver of his right to call in the principal before the fixed time; but the judgment in that case, as reported, lays down no rule of the kind, but was clearly a mere determination of the balance of convenience until the hearing of the action brought by the mortgagee for possession of the mortgaged property (l).

Sale in bank-
ruptcy before
period for
payment

If the mortgagor becomes bankrupt, the mortgagee may obtain an order for sale, though the period for calling in the principal has not arrived, under a stipulation of this nature (l).

(b) *Re Hone*, 1r R. 8 Eq 65

(c) *Brown v. Cole*, 14 Sm 427

(d) *Coudry v. Day*, 1 Griff 316, 29 L J Ch 39

(e) *Ramsbottom v. Wallace*, 5 L J N S Ch 92, *Lawless v. Mansfield*, 1 Dr & War 557.

(f) *Hicks v. Gardner*, 1 Jur. 541. See *Roddy v. Williams*, 3 J & L. 1.

(g) *Keene v. Buscoe*, 8 Ch D 201. See *Williams v. Stienne*, 5 Q B D 409, C A.

(h) 2 J & H 423

(i) Coote on Mortgages (5th ed), Vol I p 246

(k) See *Re Taaffe*, 14 Ir Ch R 347, *Keene v. Buscoe*, 8 Ch D at p 203

(l) *Exp Bignold*, 3 Deac 151

Usually, where the principal is made repayable by instalments, the forbearance of the right to call in the whole of the principal is made conditional on the regular and punctual payment of the instalments by means of a proviso that, in default of regular payment, the creditor should be at liberty to sue at once for his whole debt (*m*).

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Proviso for
payment of
principal by
instalments

Where mines form the subject of a mortgage, it would seem to be a proper arrangement that the money should be made repayable by instalments; the mortgagor will thus have the advantage of paying off the debt gradually out of the profits of the mines, while the mortgagee will be protected against the exhaustion of the security without a corresponding reduction of the debt (*n*).

Mines.

Where a creditor gave time for payment of an existing debt upon security being given for payment thereof by instalments, on the failure in payment of any one of which the whole debt was to become payable, the condition was strictly enforced (*o*).

If, after default in payment of an instalment, the mortgagee accepts payment thereof, this is not a waiver of the breach (*p*) so as to disentitle the mortgagee from calling in the whole principal.

Acceptance of
instalment
after default

A stipulation may be inserted in the mortgage deed that a commission or bonus shall be paid in default of punctual payment of any instalment (*q*).

Proviso for
bonus on
default.

xiii.—Covenants for Insurance against Fire.—Till recently, where the nature of the mortgaged property was such as to require insurance against fire to protect the security from risk of loss, it was the usual practice to insert in the mortgage deed not only covenants by the mortgagor for that purpose, but also a clause empowering the mortgagee to insure in case of default by the mortgagor, and to charge the latter and the mortgaged property with the premiums and interest. This clause was formerly important, as, if the mortgage contained no stipulation

Former
importance
of such
covenants

(*m*) *Dav Conv* (4th ed.) Vol II pt ii p 49, *Byth & Jarm Conv* (4th ed.) Vol III p 1171.

(*n*) *Dav Conv* (4th ed.) Vol II pt ii p 433.

(*o*) *Sterne v Beck*, 1 De G J & S 595. See *Roddy v. Williams*, 3 J &

L 1, *Edwards v Martin*, 25 L J Ch 284, *Burrooes v Molloy*, 2 J & L 521.

(*p*) *Keens v Biscoe*, 8 Ch D 201. See *Cowdry v Day*, 1 Giff 316.

(*q*) *General Credit, &c Co v Glegg*, 22 Ch D 649.

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to that effect, the mortgagee, whether in possession or not, would not have been entitled to any allowance in respect of payments made by him for insuring the property against fire (*r*) And even where there was a covenant by the mortgagor to insure, but no express power for the mortgagee to insure on the mortgagor's default, it was held that the mortgagee could not be allowed to take the premiums paid by him against a second mortgagee (*s*) And this rule still applies to all mortgage deeds executed before the 28th of August, 1860, and to all charges whenever made, if not made by deed

Lord Cranworth's Act

Lord Cranworth's Act (*t*), which came into operation on that date, gave to mortgagees whose charges were secured by deed a statutory power to insure the mortgaged property, and to add any premiums paid by them to the principal moneys secured, as if such power had been in terms conferred by the person creating the charge But this enactment is now repealed, except as to instruments executed before the 1st of January, 1882, by the Act next referred to.

Conv. Act, 1881.

By the Conveyancing and Law of Property Act, 1881 (*u*), it is enacted that—

Power to insure incident to estate or interest of mortgagee.

Sect 19 (1) A mortgagee, where the mortgage is made by deed, shall, by virtue of the Act, have the following power, to the like extent as if it had been in terms conferred by the mortgage deed, but not further, namely —

- (1) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money

And by the same Act, it is enacted as follows —

Amount and application of insurance money.

Sect 23 (1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by the Act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured

- (2) An insurance shall not, under the power conferred by the

(*r*) *Dobson v Land*, 8 Hare, 216;
Bellamy v Bruckenden, 2 J & H 137
(*s*) *Brook v Stone*, 13 W R. 401.

(*t*) 23 & 24 Vict c, 145, s. 11
(*u*) 44 & 45 Vict. c 41.

Act, be effected by a mortgagee in any of the following cases (namely) CHAPTER X

- (1) Where there is a declaration in the mortgage deed that no insurance is required
- (ii) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed.
- (iii) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by the Act authorized to insure
- (3) All money received on an insurance effected under the mortgage deed or under the Act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received
- (4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage

The statutory provisions above set out may be varied or altogether excluded by the mortgage deed; and they do not apply to mortgage deeds executed before the 1st of January, 1882 (x).

It is to be observed that this Act does not imply any covenant by the mortgagor to insure or to produce the policy and receipts for premiums. Covenants of this nature should therefore still be inserted in mortgage deeds, otherwise the mortgagee may have difficulty in ascertaining whether the default in effecting and maintaining an insurance has occurred, which alone gives rise to the mortgagee's statutory power of insuring the property.

These enactments do not import covenant by mortgagor to insure

In the absence of a stipulation in the mortgage deed that the policy moneys receivable in respect of an insurance kept up by the mortgagor shall be applied in making good the loss or damage, it was held that the mortgagee could not require the moneys to be so applied, though the mortgage deed contained a covenant by the mortgagor to insure (y). Under the Act such a covenant would be sufficient to entitle the mortgagee to require the moneys to be so applied, but in absence of the covenant he would have no such right, as the insurance in respect of which the moneys would be received would not have been effected either under the mortgage deed or under the Act.

Application of policy moneys receivable by mortgagor

(x) See s 19, sub-ss (2), (3), and (4), set out *post*, p 384

(y) *Lees v Whiteley*, L. R. 2 Eq

143, *Rayner v Preston*, 18 Ch D 1, C A. See also *Poole v Adams*, 33 L. J. Ch 639.

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With regard to s. 23, sub-s (4) of the Act, it must be borne in mind that by the statute 14 Geo. III c 78, s 83 (perpetuated by the statutes 7 & 8 Vict c 84, 18 & 19 Vict c 122, and 28 & 29 Vict c 90), directors of insurance companies are in certain cases authorized and required, upon the request of any person interested in any buildings burnt down or damaged by fire, to apply the insurance moneys in restoring the buildings (z)

Covenant
to pay
premiums

It is further to be observed that by s 19, sub-s (1) (ii), of the Act of 1881, premiums paid by a mortgagee in respect of an insurance effected by him under the statutory power are only made a charge upon the mortgaged property, and not a debt for which the mortgagor is personally liable. It is therefore advisable that the mortgage deed should contain an express covenant by the mortgagor for repayment of such premiums.

Joint insur-
ance by mort-
gagor and
mortgagee

If the mortgagor and mortgagee effect a joint insurance on the mortgaged estate, the mortgagee paying the premiums, and, the premises being destroyed by fire, the mortgagor's assignees procure payment from the company, they will be ordered to pay the insurance money into Court, though they have already paid it to the account in bankruptcy, there being no right in one of the parties, in respect of a joint security, to apply the produce, irrespective of the claims of the other party (a).

Where an insurance of the mortgaged premises had been effected in the joint names of the mortgagor and mortgagee, the Court, upon the receipt of the insurance money by the assignees in bankruptcy of the mortgagor, ordered payment of the money into Court until the rights of the parties thereto could be ascertained (b).

A policy of insurance against fire, being a strictly personal contract for the indemnity of the assured, is not assignable without the consent of the insurance office, which is usually procured either by an indorsement on the policy, or an entry in the books of the office (c). The question whether such assignment vested the right of action at law in the assignee has become of no moment since the Judicature Acts. In the case of a mortgage of property insured under an existing policy, the benefit of the policy would, even without express stipulation, pass to the

(z) *Exp Goreley*, 4 De G J & S 477, *Sampson v Scottish Union Ins Co.*, 1 H & M 618

(a) *Rogers v Grazebrook*, 12 Sim 557

(b) *Rogers v Grazebrook*, 12 Sim 557

(c) *Dowd on Ins* 408, *Dav. Conv.* Vol II pt II p. 54

mortgagee with the property insured (*d*) A different principle applies when the policy is subsequent to the mortgage, and there is no covenant by the mortgagor that the policy moneys shall be applied in payment of the mortgage (*e*) The mortgagor has no equity to be repaid out of the produce of the policy money expended by him about the rebuilding of the property, the expenditure being voluntary (*d*)

A fire insurance being only an indemnity, if the insured receives compensation from other sources, the insurer is entitled to recover it (*f*)

On the analogy of the cases which decide that a policy against fire by a vendor is, in the absence of contract, avoided after sale for want of interest (*g*), and that a tenant is not entitled to the landlord's insurance effected after the lease (*h*), it would seem that, as between mortgagor and mortgagee, neither of them would be entitled to the benefit of an insurance effected by the other subsequently to the mortgage, in the absence of stipulation to the contrary (*i*).

xiv.—Covenants for Title—Mortgage deeds formerly, according to the usual practice, contained express covenants for title by the mortgagor Such covenants were in their general character similar to those inserted in purchase deeds, differing only in their greater comprehensiveness The insertion of such covenants is now rendered generally unnecessary by virtue of the provisions of sect 7 of the Conveyancing and Law of Property Act, 1881 (*h*), which enacts that there shall be implied—

Covenants for title implied by virtue of statute.

(1) (C) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely) —

On mortgage by beneficial owner.

That the person who so conveys has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed, and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall

(*d*) *Garden v Ingram*, 23 L J Ch 478

5 Ch D 569

(*e*) *Lees v Whitley*, L R 2 Eq 148 See also *Rayner v Preston*, 18 Ch D 1, C A (case of vendor and purchaser)

(*g*) *Pool v Adams*, 33 L J Ch 639.

(*h*) *Leeds v Cheetham*, 1 Sim 146, *Lloft v Dennis*, 1 E & E 474

(*i*) *Dav Conv Vol II pt ii p 56*

(*f*) *Darrell v Tibbits*, 5 Q B D 560, following *North British, &c Insurance Co v London, &c Insurance Co*,

(*k*) 44 & 45 Vict c 41 As to covenants for title implied by virtue of the statute in mortgages of leaseholds, see *post*, p 167

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be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made, and further, that the person who so conveys, and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance, and every part thereof, to the person to whom the conveyance is made, and to those deriving title under him, subject as is so expressed and in the manner in which the conveyance is expressed to be made, as by him or them, or any of them, shall be reasonably required

On convey-
ance by
trustee or
mortgagee

(F) In any conveyance, a covenant against incumbrances, in the terms set forth in the section, is deemed to be included by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely).

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed

On convey-
ance by direc-
tion of bene-
ficial owner.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction, and a covenant on his part shall be implied accordingly

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(3) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband as beneficial owner, and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife

On conveyance by husband and wife

(4) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance

(5) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land

(6) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested

(7) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied (i)

Variation of statutory covenants

(8) This section applies only to conveyances made after the commencement of this Act

The statutory covenants are, by the appropriate words, imported into and implied in any "conveyance" by way of mortgage (m); the term "mortgage" includes "any charge on any property for securing money or money's worth," but the covenants will not be implied unless the charge is by way of conveyance or assurance

Effect of this enactment

These covenants are entered into with the mortgagee, his heirs and assigns, and run with the land (n). The covenant for right to convey is obviously of very little use during the continuance of the mortgage; as the mortgagee, by bringing an action on it, could only recover his mortgage money, and that he could

Covenants for title run with the land

(i) See *Williams v Hathaway*, 6 Ch D 544

(m) 44 & 45 Vict c 41, s 2 (vi)
See *Ibid* s 7, sub-s (6)

(n) As to the operation of covenants for title absolute or unqualified, see *Thackeray v Wood*, 6 N R 305. See also Sug V & P 600—609.

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more easily obtain by suing on the covenant for the payment of the money. But this covenant, as also the other covenants for title, become valuable after a foreclosure or sale, as they then stand in lieu of the common covenants for title contained in purchase deeds, and are, indeed, the more valuable on account of their being absolute, instead of qualified (o).

Covenant for
quiet enjoy-
ment

The covenant for quiet enjoyment is made to commence, in point of operation, after default in payment of the mortgage money on the day appointed in the proviso for redemption; but this form of covenant does not (in the absence of a proviso for quiet enjoyment until default amounting to a demise) postpone the mortgagee's right of entry, or disable him from bringing ejectment at once (p).

Covenant for
further
assurance

It scarcely need be noticed that the mortgagor cannot, under his covenant for further assurance, on default in payment, be called upon to release his equity of redemption, and that he can, under such covenant, be required to confirm the mortgage only (q).

Whether
subsequent
covenant for
production of
deeds may be
required.

The covenant for further assurance will not, apparently, entitle the mortgagee to require the mortgagor to enter into a covenant for production of the title deeds to the mortgaged property, if not handed over to the mortgagee on completion of the mortgage, or in lieu thereof, to give to the mortgagee the statutory acknowledgment of his right to the production of the deeds, and undertaking for safe custody thereof (r), to entitle him to do so would be to allow him to obtain protection on evidence which he might and ought to have obtained at the time of the mortgage (s).

Implied
indemnity
against in-
cumbrances

Where a person sold part of property comprised in a mortgage, and the conveyance to the purchaser did not mention the mortgage, but contained a covenant for further assurance, it was held that, the conveyance being for value, the covenant imported an indemnity against incumbrances, and that the unsold part of the property must bear the mortgage debt (t).

(o) See also, as to the effect of the statutory covenants for title implied by conveying "as beneficial owner," *David v. Sabin*, (1893) 1 Ch 523, 532, C A.

(p) *Doe v. Lightfoot*, 8 M & W 553.

(q) *Bankes v. Small*, 36 Ch D 716, C A.

(r) *Farn v. Ayres*, 2 S & St 533.

The marginal note to the report of that case is obviously inaccurate, production was ordered, apparently, on the ground of an equity independent of any covenant for further assurance.

(s) See *Hallett v. Middleton*, 1 Russ. 243.

(t) *Re Jones, Farrington v. Foister*, (1893) 2 Ch 461, 474.

As trustee-mortgagors do not convey as "beneficial owners" but "as trustees," so as only to give by implication the statutory covenant that they have not incumbered, a person taking a mortgage from trustees cannot claim the benefit of a covenant for further assurance; but, inasmuch as the mortgagee will become a person beneficially interested under the settlement or will, he will, as such, have a right to production of the title deeds relating to the mortgaged property, independently of any covenant.

It has been suggested that the covenant for further assurance should extend to confirm a foreclosure or a sale, at the expense of the person requiring it (u).

This covenant appears to operate only to secure to the covenantee the precise estate or interest purported to be conveyed to him by the deed in which the covenant is contained (x). So, where a tenant in tail, conveying as absolute owner, purports to convey the fee simple, but really conveys only a base fee, the covenant may be extended so as to bind the grantor to execute a deed to completely bar the estate tail, and in such a case the covenant will be enforced (y); but if the fact that the grantor is only tenant in tail appears on the face of the deed, and there is nothing to show that it was the intention of the parties that the base fee created by the deed should be enlarged, it seems very doubtful whether the grantor could be required, under a covenant for further assurance in the usual form contained in a mortgage deed, to execute a deed converting the base fee into a fee simple (z).

Whether covenantor can be required to perfect a disentailing assurance

But if the original contract between the parties shows that such was the intention, the grantor will be compelled under his covenant for further assurance to pass to the grantee any estate or interest which the former may acquire in the property conveyed subsequently to the conveyance, even though he acquire ownership ~~phase~~ (a). So where a mortgagor conveyed a ~~contingent~~ ^{reversionary} interest in fee and covenanted for further assurance, and the reversion was afterwards destroyed by the tenant of the prior estate, the mortgagor was held liable in equity to perfect

(u) *Dev. Conv.* (4th ed.), Vol. II. pt. II p. 111.

(x) *Atkins v. Utton*, 1 Ld. Raym. 36; see *Exp. Vanderkiste, Re Roche*, 25 L. R. Ir. 284, C. A.

(y) *Bankes v. Small*, 36 Ch. D. 716, C. A.

(z) *Davis v. Tollemache*, 2 Jur. N. S. 1181.

(a) *Taylor v. Debar*, 1 Ch. Ca. 212. See also *Pye v. Dalebury*, 3 Bro. C. C. 595, *King v. Sims*, 5 Taunt. 427, *Smith v. Baker*, 1 Y. & C. C. C. 223, *Heath v. Crutwell*, L. R. 10 Ch. A. 31.

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the security out of a new interest in the same property which he took under the will of that tenant (*b*) It would seem, however, that in this case the enforcement of the equitable right of the mortgagee to have the security perfected might have been upheld on the ground of estoppel, independently of any covenant for assurance (*c*).

The fact that the grantee has a title by estoppel is no defence to an action for specific performance of a covenant for further assurance (*d*).

If a conveyance has been destroyed or lost, it would seem that under the covenant for further assurance the covenantor may be required to execute a duplicate thereof (*e*).

xv.—Statutory Form of Mortgage—The Conveyancing and Law of Property Act, 1881 (*f*), s. 26, enacts that—

(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of the Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely)

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money

Secondly, a proviso to the effect following (namely) .

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagor ~~at any~~ time thereafter, at the request and cost of the mortgagee, shall reconvey the mortgaged property to the mortgagee, or as he shall direct.

By sect 28 of the same Act it is enacted that—

In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as

(*b*) *Noel v. Bewley*, 3 Sim 116

(*c*) See *Seabourne v. Powell*, 2 Vern.

11, *Jennings v. Blincorne*, 2 Vern 609,

Jones v. Kearney, 1 Dr. & War 134, 151

(*d*) *Bensley v. Burdon*, 8 L. J. Ch. 85

(*e*) *Bennett v. Ingoldsby*, Finch, 962

See *Napper v. Lord Alington*, 1 Eq.

Ca Ab 166

(*f*) 44 & 45 Vict c 41.

mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them, and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him

xvi.—Assignment of outstanding Terms.—It was a common practice to keep on foot long terms of years, after the original purposes of their creation had been satisfied, and on every mortgage of the inheritance to assign them to a trustee for the mortgagee's protection (*g*). The assignment of satisfied terms, however, is now rendered impracticable by 8 & 9 Vict c 112, which has consequently deprived the mortgagee of a valuable means of protection against incumbrances (*h*). The mortgagee, however, should not dispense with the assignment of a term on the occasion of a mortgage, unless he has the surest ground for concluding that the term is satisfied within the meaning of the Act prior to his mortgage (*i*). The Act only extends to freeholds, and such customary lands as will pass by deed, or deed and admittance, and not by surrender (*k*); it consequently does not affect a term created by sub-demise.

xvii.—Collateral Securities.—Collateral securities may properly be prepared by separate deeds, in order to avoid mixing up in one deed the title to separate properties. The title to the freehold is kept distinct from the dealings connected with the subject-matter of the collateral security. Discrimination, however, is required to determine when separate deeds should be taken (*l*).

The inclusion in the same mortgage of several estates, the ownership of which may subsequently be severed, is often productive of inconvenience.

(*g*) *Shaw v Johnson*, 1 Dr & S 412, *Plant v Taylor*, 7 H & N 211, *Owen v Owen*, 3 H & C 88. See Sug R P St 282, note, ed 2.
 (*h*) Sug R P. Stat 277, ed. 2, *Shaw v Johnson*, *sup*
 (*i*) *Doe v Price*, 16 M & W. 603, *Doe v Jones*, 13 Jur 824
 (*k*) See s 3
 (*l*) *Dav Conv.* (4th ed.), Vol II pt II. 532

CHAPTER XI

OF A MORTGAGE OF COPYHOLDS.

Conditional
surrender

i.—Mortgage by Conditional Surrender.—Mortgages of copyholds, on account of the peculiar nature of the tenure, retain in general their primitive form. They usually consist of a conditional surrender by the mortgagor to the mortgagee and his heirs. The surrender may be made in the manor court, but is now frequently made out of court (*a*) to the steward or his deputy, unless the custom of the manor requires it to be made before the tenants. By the condition, the surrender is made void on payment by the mortgagor, &c, of principal and interest to the mortgagee, &c, on a given day; the condition is entered on the rolls, and immediately follows the surrender.

Separate deed
of defeasance.

The condition may, however, be contained in a separate deed of defeasance, of even date with the surrender; but, as remarked by Mr Watkins (*b*), this mode should never be resorted to when it can be avoided; for the defeasance may be lost, and then, as the surrender is absolute on the rolls, the proof of the condition may be difficult; and besides, the title to the lands should always appear on the records of the manor; and, therefore, even if a separate deed of defeasance be executed, it should be always entered on the rolls.

Another important reason against having an absolute surrender with a separate deed of defeasance formerly existed, viz., that if the mortgagee died without an heir, the lord of the manor might have entered for the escheat, inasmuch as he had no notice of the condition on his court rolls (*c*). But if the lord had

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homage is not essential to the validity of an admission. See 4 & 5 Vict c 35, s 90.

(*b*) 1 Watk Cop 116

(*c*) *Att.-Gen. v. Duke of Leeds*, 2 My. & K. 343.

notice of the condition for redemption, or of any trusts, although only referred to as subsisting in a separate deed, he was bound; and if the trusts were by way of mortgage security, the mortgagor was entitled to re-admittance on payment of the debt (*d*).

The legal rights of the lord claiming by way of escheat, in default of heirs or forfeiture, are, however, now placed under the control of the Chancery Division, for the benefit of the parties beneficially entitled (*e*); so that there is little or no risk of either mortgagor or mortgagee being prejudiced by the escheat or forfeiture of the other's tenancy.

Escheat and forfeiture.

The money ought not to be advanced till the surrender is actually made, for a second mortgagee without notice may take a surrender and be admitted, and thus, having the legal estate, gain priority (*f*). On performance of the condition by payment of the money on the day appointed, the surrender is at an end, and the land reverts to the surrenderor, as of his former estate, without any re-admission or fine (*g*); but if the day of payment is past, the surrenderor, having only an equity of redemption, must apparently, in strictness, pay a fine and be re-admitted (*h*). Whether the money is paid at the day or not, if the surrenderee has not been admitted, it is considered sufficient in practice to enter satisfaction on the rolls on payment of the mortgage debt, without requiring the mortgagor to be re-admitted (*i*).

Necessity of surrender.

As well in the case of a conditional as of an absolute surrender, the surrenderor remains tenant to the lord until the admission of the surrenderee (*k*), and as well for the purposes of forfeiture and escheat, as for other purposes (*l*); so much so, that prior to 55 Geo III c 192, the mortgagor could not, after the conditional surrender and before the admission of the surrenderee, devise the copyholds without a previous surrender to the use of his will (*m*).

Mortgagor tenant till admission of mortgagee

It is not usual for a mortgagee to be admitted, for if he is admitted and the condition is broken by the non-payment of the

Mortgagee not usually admitted

(*d*) *Weaver v Maule*, 2 R & M 97.

(*e*) See 56 & 57 Vict c 53, s 26, and 4 & 5 Will IV. c 23, and 13 & 14 Vict c 60, ss 15, 46, both of which enactments are now repealed.

(*f*) *Ozwock v Plumen*, Bac Abr Mortgage, E (7th ed), Vol v p 684.

(*g*) *Simonds v. Lawnd*, Cro Eliz 239

(*h*) *Galb Ten* 276.

(*i*) 1 Scriv Cop (4th ed) 194, (5th ed) 129

(*k*) 1 Scriv. Cop (6th ed) 91.

(*l*) *Rex v Mildmay*, 5 B & Ad 254.

(*m*) *Doe v Wroot*, 5 East, 132, *Kenebel v Scrafton*, 8 Ves 30. See also *Galb Us*, 3rd ed. p. 73, n.

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money, his estate is absolute, and he becomes liable to the payment of rents and heriots and to the performance of the services, which is frequently undesirable; and when the mortgage is paid off, a re-admission and fresh fees and fine will be necessary, and the mortgagor will thereupon gain a new estate, and the descent be altered; so that if the lands had originally descended to him *ex parte materid*, they will afterwards descend as if he had taken by purchase (*n*).

Whether lord
can compel
admittance of
mortgagee

Unless there is a special custom in the manor, by which the lord may compel a surrenderee to come in and be admitted, he cannot, it seems, compel the mortgagee to be admitted, even after condition broken (*o*); but if there is such a custom in the manor, it seems he may compel him, and the Court will not give relief (*p*).

Conditional
surrender to
uses as
mortgagee
appoints.

The practice of framing conditional surrenders to such uses as the mortgagee should appoint in order to save the expense of a double admittance cannot successfully be resorted to; as the lord is not bound to enrol such surrender, since it tends to interfere with the fruits of tenure (*q*). But if the lord accept the surrender, he cannot afterwards refuse to act on it (*r*).

Deed of
covenants to
accompany
surrender

ii.—Deed of Covenants for or on Surrender.—In effecting a mortgage of copyholds it is necessary that there should be a deed, in addition to the surrender, for the purpose of containing covenants by the mortgagor for payment of principal and interest and for title, and other covenants and provisions which may be necessary for carrying out the terms of the contract, and for the purpose of conferring on the mortgagor a power of sale on default, which cannot be contained in, or implied by, the surrender itself.

This deed may be executed either previously to, contemporaneously with, or after the surrender. According to the more usual and better practice, the deed is executed previously to the surrender, and is in the form of a covenant to surrender the lands, containing also the ancillary covenants and provisions. Even when the deed of covenants precedes the surrender, the

(*n*) *Benson v. Scott*, 4 Mod. 251;

119.

Dox v. Morgan, 7 T. R. 103.

(*o*) *Basypool v. Long*, Cro. Eliz. 379;

(*q*) *Flack v. Downing Coll*, 13 C. B.

King v. Dilston, 1 Salk. 386

945

(*p*) *Tredway v. Fotherley*, 2 Vern.

(*r*) *Eddlestone v. Collins*, 3 De G. M.

367. See Savv. Cop. (6th ed.) 118,

& G. 1.

deed and surrender are considered to be parts of one and the same transaction (s). So, where a surrender was made referring to a previous deed, which stated on the face of it that the surrender was made as a security for money, it was held that the deed and surrender must be taken together as forming a mortgage, and that upon the death of the surrenderee the lord must admit his heirs on payment of the customary fine (t). A receipt clause should be inserted in the body of the deed of covenants, or indorsed thereon.

It is not usual, in mortgages of copyholds, to provide by special covenants for the payment by the mortgagor of all fines, costs, and expenses attendant on admittance, and other incidents of copyhold property; the matter is left to the general rule of law, and undoubtedly the mortgagor would not be permitted to redeem until after repayment to the mortgagee with interest of any such sum as the latter might have been compelled to expend. The case differs considerably from that of leaseholds, where renewal is optional; but it is sometimes thought advisable to arm the mortgagee with a covenant for payment of the sums he might be compelled, or might find it desirable, to expend by reason of the copyhold tenure. If the copyholds be held for lives, the mortgage (u) should contain the usual provisions for renewal and payment of the fines.

Payment of
fines and
expenses

A covenant to surrender copyholds by way of mortgage is a "conveyance," and an equitable charge is a "mortgage" within the meaning of the Conveyancing and Law of Property Act, 1881 (x); and it is clear that a covenant to surrender copyholds creates a valid equitable charge thereon. If, therefore, a mortgagor covenants "as beneficial owner" to surrender, it seems clear that the mortgagee will thereby obtain the benefit of the implied statutory covenants for right to convey, quiet enjoyment, free from incumbrances, and further assurance, and also of the implied statutory powers of sale and other powers of a mortgagee under the Act.

Covenants
for title

The powers of sale, &c., given by sects. 19—24 of the Act apply only when the mortgage is by deed, and are, therefore, not implied by virtue of a conditional surrender not made in pursuance of an antecedent deed of covenant. In such a case a

Power
of sale

(s) *Riddell v. Riddell*, 7 Sum. 529.

(u) *Dav. Conv.* (4th ed.), Vol. II.

(t) *Weaver v. Kinglake*, 9 L. J. Ch.

pt. II. p. 588.

(x) 44 & 45 Vict. c. 41, s. 2 (5)

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proviso expressly charging the property should be inserted in the deed of covenants accompanying the surrender, so as to confer such powers on the mortgagee, or the deed should, according to the former practice, contain full powers of sale, &c, with the ancillary clauses (*y*).

Insurance
of lives

In mortgages of copyholds for lives, it is usual to insure the lives of the *cestus que vie* for further security, and in such case the deed will contain covenants for keeping up the policies. But where money is raised by the Court upon such property the persons entitled cannot be compelled to insure (*z*).

Second sur-
render by
mortgagor.

iii.—Rights, &c. of unadmitted Mortgagee.—Until after the mortgagee has been admitted, the mortgagor may, in the mean time, make a second surrender, which will be good if the first surrender is not perfected by admittance (*a*). But although the first surrender is not inrolled, the second mortgagee, though without notice of the former, does not, by the inrolment of his surrender, acquire priority (*b*), unless by the custom of the manor there was a limited time for presenting surrenders made out of Court; and the same applies to an immediate purchaser (*c*).

Ejectment.

A mortgagee who has not been admitted cannot maintain ejectment, unless, in the case of a tenant of the mortgagors the relation of landlord and tenant has been created *ahunde* (*d*). But, inasmuch as a subsequent admittance will relate back to the date of the surrender, the mortgagee may, after admittance recover in ejectment against, and also mesne profits from, a purchaser who has been admitted under a later surrender (*e*).

Foreclosure.

After condition broken, and before admittance, the mortgagee may bring his action to foreclose (*f*), and, if no surrender has been made, he may compel the mortgagor to surrender at his own expense (*g*), unless the covenant to surrender otherwise provides (*h*).

(*y*) Having regard to the doubt raised by an eminent conveyancer (see Wolst & Brint Conv p 68), as to whether a deed of covenant to surrender by way of mortgage will import the statutory powers, it will be prudent, in settling such a deed, to insert a charging clause as suggested in Byth. & Jarm Conv. (4th ed.), Vol. III p. 977.
(*z*) *Grantley v Garthwaite*, 6 Madd 98.

(*a*) *Burgane v. Spuring*, Cro Car.

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(*b*) *Horlock v Priestley*, 2 Sim 75

(*c*) *Doe v Gibbons*, 7 Car & P 161.

(*d*) *Rayson v. Adcock*, 9 Jur N S 800, C P

(*e*) *Holdfast v. Clapham*, 1 T. R. 600
Rez v. Midamay, 5 B & Ad 254, *Ben-son v Scott*, 4 Mod. 251, *Doe v Gibbons* 7 Car & P 161.

(*f*) *Sutton v Stone*, 2 Atk 101

(*g*) *Pryce v Bury*, 2 Drew 41.

(*h*) *Hill v. Price*, Dick. 344.

If a surrenderee to him and his heirs dies before admittance, his heir may be admitted (i). CHAPTER XI

If the mortgagor dies before the admittance of the mortgagee and a heriot is paid, and the mortgagee afterwards dies, and his heir claims to be admitted, Mr Watkins (k) makes a query, whether, inasmuch as the admittance of the surrenderee or his heir always relates to the time of the surrender so as to avoid all intermediate rights and interests contrary to the surrender, such as the freebench of the surrenderor's widow, and the like (l), or even an intermediate purchase, a heriot will not on such admittance become due, as if the surrenderee had died seised; and, if so, whether the lord ought not to return the first heriot. Arguing from principle, it would seem that such would be the law; for, after the admittance of the heir of the surrenderee, it would be difficult to contend that, *fictione juris*, the surrenderee died seised, so as to avoid the widow's freebench, &c, but not so as to give the lord a right to his heriot, and the law would scarcely permit the lord to hold both. But the case has not been decided.

Death of mortgagor before admittance of mortgagee

After the conditional surrenderee has been admitted, he becomes tenant to the lord, and the surrenderor may, before condition broken, release to him the benefit of the condition (m), and, after condition broken, he may release to him the equity of redemption; and no fine will in either case be necessary, for the mortgagee is already in possession, and on his admittance a fine has been already paid (n).

Release of condition

Where a surrender and admittance of a purchaser has been entered on the court rolls in such a manner as would be a fraud upon an intended mortgagee, who had advanced his money upon the security of the property, the Court will, upon the consent of the lord being given, or his being a party to the suit, order the entry to be reformed (o).

Fraudulent surrender set aside in favour of mortgagee.

By the Copyhold Act, 1894 (p), a surrenderee by way of mortgage under a surrender entered on the court rolls, in possession, or in receipt of the rents and profits of land, is to be deemed a tenant within the meaning of that Act, and entitled to obtain or join in obtaining and effecting enfranchisement. Any money

Right of mortgagee of copyholds to obtain enfranchisement.

(i) Vin Abr tit "Copyholds," 98

(k) 2 Watk Cop 4th ed p 111, n.

(l) *Benson v Scott*, 4 Mod. 251, S C, 12 Mod 49, *Vaughan v Atkins*, 5 Burr. 2785.

(m) *Hull v Sharbrook*, Cro Jac 36, *Kite and Querinton's Case*, 4 Rep 25.

(n) *Kite and Querinton's Case*, *sup*

(o) *Elston v Wood*, 3 My. & K 678.

(p) 57 & 58 Vict. c. 46, ss. 1, 39, 94.

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paid by him for that purpose is to be added to the amount due to him as mortgagee; and the land is not to be redeemable without payment of such money with interest thereon.

Effect of
enfranchise-
ment

By sect. 20 of the same Act (*q*), a mortgage of copyholds becomes, on enfranchisement, a mortgage of the freehold, but subject to any charges under the Act for consideration money, interest, and expenses of enfranchisement (*r*).

Mortgage
of equity of
redemption.

An equity of redemption in copyholds, being an equitable estate only, may be effectually mortgaged by deed, without surrender.

(*q*) Re-enacting in effect the corresponding provision of the repealed Copyhold Act, 1841 (4 & 5 Viet c 35), s 81.

(*r*) See as to enfranchisements, *post*, p 385

CHAPTER XII

OF A MORTGAGE OF LEASEHOLDS.

i.—Mortgage of Leaseholds by Assignment.—A mortgage of leaseholds may be by assignment of the whole unexpired residue of the term. It has long been settled, and it is now clear, both on principle and sound authority, that if a mortgagee accepts an assignment of all the remaining interest in the term, he will be liable to the payment of the rent, and performance of the covenants in the original lease, so long as he shall be the legal owner thereof, although he shall not take actual possession of the premises (*a*). The Court will not, on the one hand (*b*), assist the lessor in an action brought by him against the mortgagee for a discovery of the deed of assignment to him and for a specific performance of the covenants, but will leave the lessor to his remedy; so neither will it, on the other hand (*c*), after the lessor has obtained judgment against the mortgagee for the arrears of rent, give the mortgagee relief, although he has never been in possession.

Liability of mortgagee by assignment

In case of mortgage by assignment, the liability of the mortgagee on the covenants ceases on transfer or sale and assignment (*d*).

Cesser of mortgagee's liability on transfer of mortgage.

It was formerly supposed that a depositary of a lease was liable for the rent and covenants in a suit by the lessor (*e*). But it is now clear that a depositary of a lease is not answerable for the rent and covenants of the lease, and the landlord cannot compel him to take, or the mortgagor to execute, an assignment,

Depositary of lease not liable on covenants.

(*a*) *Westerdell v Dale*, 7 T. R. 312, *Stone v Evans*, Woodf. L. & T. 12th ed. p. 244, *Turner v Richardson*, 7 East, 340, n., *Mayor of Carlisle v. Blamire*, 8 East, 487, *Traherne v. Sadler*, 5 Bro. P. C. 179, *Williams v. Bosanquet*, 1 Br. & B. 238, 3 Moo. 500, *Burton v. Barclay*, 7 Bing. 746;

Haig v. Homan, 4 Bl. N. S. 38

(*b*) *Sparkes v. Smith*, 2 Vern. 276.

(*c*) *Fulkington v. Shaller*, 2 Vern. 374.

(*d*) *Onslow v. Currie*, 2 Madd. 330.

(*e*) *Clavering v. Westley*, 3 P. Wms. 402, *Lucas v. Comerford*, 3 Bro. C. C. 166, *Flight v. Bentley*, 7 Sim. 149.

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even if the depositary has been in possession and paid rent (s). In such a case, though not liable for the rent and covenants under the lease, he would apparently be liable in respect of his tenancy.

Forfeiture by mortgagor

Where judgment by default has been taken against a mortgagor-lessee for forfeiture, the equitable depositree of the lease can set aside the judgment under Ord XXVII. r. 15, and defend in the name of the lessee, indemnifying him (a)

Form of mortgage by demise

ii.—Mortgage of Leaseholds by Demise.—It has been generally recommended that a mortgage of leaseholds should be by way of underlease, in order to avoid rendering the mortgagee liable for the rents and covenants of the original lease. In framing such mortgages, the practice is to demise the property to the mortgagee at a peppercorn rent, reserving the last day, or the last few days of the original term, and to make the mortgagor covenant to pay the rent and perform the covenants in the original lease. It is also usual to insert in such mortgages a declaration by the mortgagor that he will stand possessed of the nominal reversion in trust for a purchaser on any sale by the mortgagees under his power, or else in trust for the mortgagee himself. The form of declaration more frequently adopted in practice has been that of a declaration of trust in favour of a purchaser; but it may be regarded as settled that a declaration of trust in favour of the mortgagee himself will not render him liable to the lessor for the rent and covenants of the lease (b); nor entitle the lessor to require him to take an assignment of the lease (c).

Effect of declaration of trust of reversion

It has been held that a mere covenant for the assignment of the nominal reversion upon a sale, in such manner as the purchaser should require, would not render the mortgagor trustee for a purchaser, so as to enable the latter to obtain an order under the Trustee Acts (d) vesting in him the outstanding reversion (e). It is, however, conceived, upon the analogy of

(z) *Moores v Choat*, 8 Sim. 508, *Moore v Greg*, 2 De G & Sm 304, 2 Ph 717; *Walters v The Northern Coal Mining Co*, 5 De G M & G 629, *Cox v. Bishop*, 8 De G M & G 815. See *Newry Rail Co v Moss*, 14 Beav 64, *Wright v Pitt*, L R 12 Eq 408.

(a) *Jacques v Harrison*, 12 Q B D. 165, C A. See *North London Land Co v. Jacques*, W N. (1883) 187.

(b) *Walters v Northern Mining Co.*, 5 De G M & G 629.

(c) *Moore v Greg*, 2 De G & S. 304.

(d) 13 & 14 Vict c 60, s 30, and 15 & 16 Vict c 55, s 2 (both repealed). And see now 56 & 57 Vict c 53, ss 26, 31.

(e) *Re Property*, 22 L. J. Ch. 948. And see *Re Carpenter*, Kay, 418, 420.

the rule with respect to declarations of trust of copyholds covenanted to be surrendered (*f*), that a declaration in either of the forms above referred to would entitle a purchaser or the mortgagee himself (as the case may be) to a vesting order, if the mortgagor should refuse or fail to assign the reversion.

It also seems clear that the mortgagor, after a sale, will be entitled, on the ordinary footing of a trustee, to claim an indemnity from the purchaser in respect of the rents and covenants (*g*). Indemnity against rent and covenants

A mortgage security by way of underlease is, however, affected by the possibility of a breach of covenant by the mortgagor, whereby the lease may become liable to forfeiture, and, in such case, independently of the statutory enactments hereafter referred to, the mortgagee has no remedy against the lessor (*h*). Forfeiture of lease

The effect of recent legislation and decisions has been to alter materially the incidents formerly considered to attach to mortgages by demise, as regards the risk of forfeiture of the original term.

In the first place, the right of a lessor to enforce forfeiture has been to a great extent restricted. By the Conveyancing and Law of Property Act, 1881 (*i*), s. 14, it is enacted as follows:— Conv Act, 1881, s 14

(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. Restrictions on and relief against forfeiture of leases.

By sub-sect (2), where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may apply to the Court for relief; and the Court may grant or refuse such relief on such terms as it may think fit.

And by sub-sect. (3), for the purposes of this section a lease includes an original or derivative underlease, and a lessee includes an original or derivative underlessee.

It has been decided that the effect of the last sub-section is merely to make the provisions of the section applicable as between Effect of this section

(*f*) *Re Collingwood*, 6 W R 536

(*g*) *Phene v Gillam*, 5 Ha 1, 9

(*h*) *Nokes v Fish*, 3 Drew 735;

Hughes v Howard, 25 Beav 575.

(*i*) 44 & 45 Vict c 41, s 14.

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a derivative lessor and his lessee, and not to create new statutory rights between an original lessor and a derivative lessee claiming under his lessee, between whom no privity of contract exists (*j*)

This section does not extend to covenants and conditions against assigning, underletting, &c. (*k*); and the Court cannot, under the Act, relieve against forfeiture for breach of such covenants (*l*).

Nor does the section extend, in the case of mining leases, to covenants and conditions to allow the lessor to inspect books, workings, &c. (*k*).

The section does not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

Conv. Act,
1892, s. 2

Leases are sometimes made determinable by re-entry on bankruptcy of the lessee (*m*). Under the Act of 1881, s. 14 thereof is limited, by sub-sect. (6) thereof, so as not to extend to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest. But by the Conveyancing and Law of Property Act, 1892 (*n*), s. 2, it is enacted as follows:—

Forfeiture
in case of
bankruptcy
or execution

Sub-sect (2)—Sub-sect. 6 of sect 14 of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-sect 6 shall cease to be applicable thereto

Sub-sect (3)—Sub-sect 2 of this section is not to apply to any lease of.—

- (a) Agricultural or pastoral land;
- (b) Mines or minerals,
- (c) A house used or intended to be used as a public-house or beershop,
- (d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures;
- (e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

(*j*) *Nand v. Nineteenth Century Building Society*, (1894) 2 Q. B. at p 232, C. A.

(*k*) 44 & 45 Vict. c. 41, s. 14, sub-s. 6.

(*l*) *Barrow v. Isaacs*, (1891) 1 Q. B. 417, 430

(*m*) See as to this, *Exp Gould, Re Walker*, 13 Q. B. D. 454

(*n*) 55 & 56 Vict. c. 13.

The effect of this enactment seems to be that if the lessee of property falling thereunder, subject to a mortgage by sub-demise, becomes liable to forfeiture by bankruptcy, such forfeiture will be suspended for a period of one year from the date of the bankruptcy, during which period the lease will remain subsisting so as to support the security; and if the trustee sells the beneficial interest in the lease, the assignee will, of course, take subject to the mortgage, so that there will be no further risk of the mortgagee losing his security by forfeiture of the lease by reason of that particular bankruptcy.

Moreover, where a lessor is proceeding to enforce forfeiture, the mortgagee by sub-demise may avail himself of sect. 4 of the Conveyancing Act, 1892, to adopt the position of assignee of the lease. This section enacts as follows:—

Conv. Act,
1892, s 4

“Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease, or any part thereof, either in the lessor’s action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease, or any part thereof, in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.”

Power of
Court to pro-
tect under-
lessees on
forfeiture
of superior
leases

The terms “lease” and “underlease,” as used in sect. 14 of the Conveyancing and Law of Property Act, 1881, and in the Conveyancing and Law of Property Act, 1892, are defined by sect 5 of the latter Act to include respectively an agreement for a lease where the lessee has become entitled to have his lease granted, and an agreement for an underlease where the under-lessee has become entitled to have his underlease granted, and by the same section it is provided that the term “underlessee” occurring in the Act of 1892 is to include any person deriving title under or from an underlessee.

Definition of
“lease” and
“underlease”
for purposes
of above
enactments

By sect. 2, sub-sect. (1), of the Conveyancing and Law of Property Act, 1892, it is enacted that:—

Conv. Act,
1892, s 2

“A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment

Costs of
waiver and
forfeiture in

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bankruptcy
and execution.

of a solicitor and surveyor or valuer, or otherwise in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act ”

Effect of this
enactment

It has been decided that the expression “lessee,” as used in this sub-section, and in sect 14 of the Act of 1881 (o), does not include an underlessee of the whole of the premises comprised in the head-lease (p), and, *a fortiori*, the expression does not include an underlessee of a part only of the premises comprised therein (q). The result is that the superior lessor cannot recover from a mortgagee, by underlease of the whole or of part of the premises comprised in the lease, the expenses mentioned in the sub-section above set out.

Effect of
disclaimer
of lease in
bankruptcy.

Whether or not there be a clause in the head-lease providing for forfeiture on bankruptcy, and, independently of the consequences to the mortgagee of a breach of covenant by the mortgagor, which have been considered above, a mortgage security by way of underlease is further affected by the possibility of the bankruptcy of the mortgagor supervening during the continuance of the security, and of the exercise thereupon by the trustee in bankruptcy of the powers of disclaimer conferred upon him by the Bankruptcy Act, 1883 (r).

Leave to
disclaim
mortgaged
lease.

Under sect 55 (3) of this Act, if the bankrupt has created any mortgage or charge on the property, the leave of the Court must be obtained for a disclaimer, and, in such a case, a disclaimer without leave will be void (s). It seems, however, that, in the case of an equitable mortgage, the disclaimer will be restricted to the equity of redemption. So, it was held that a trustee of a lessee bankrupt will not be allowed to disclaim so as to prejudice the deposit of a lease, but if he assign the lease to the deposit, the latter must covenant to indemnify him from liability under the lease (t).

In a later case (u), where the property had been sub-demised by way of mortgage, it was distinctly laid down that the power of the Court to give leave to disclaim was to be exercised with a view to the administration of the bankrupt's estate for the benefit of all persons interested in that administration, without taking

(o) 44 & 45 Vict. c. 41

(p) *Nind v Nineteenth Century Building Society*, (1894) 2 Q. B. 228, C. A.

(q) *Burt v. Gray*, (1891) 2 Q. B. 98.

(r) 46 & 47 Vict. c. 52, s. 55.

(s) B. R. 1890, r. 69

(t) *Exp. Buxton, Re Müller*, 15 Ch. D. 289, C. A.

(u) *Exp. East and West India Dock Co., Re Clarke*, 17 Ch. D. 759, C. A.

into account collateral considerations as to the injury which might be occasioned to third parties by the disclaimer. But the position of the mortgagee in that case was not affected by the decision; for, if a mortgagee claims under a legal underlease, the disclaimer of the lease by the trustee will not avoid the mortgage or affect the rights and remedies of the mortgagee as against the property (*e*). If, however, the mortgagee is in possession, the lessor will be entitled to distrain on the property if the mortgagee fails to pay the rent reserved by the original lease, or to re-enter on such default or for breach of the covenants contained in that lease (*y*).

By sub-sect (6) of sect 55 of the last-mentioned Act, the Court is empowered, after a disclaimer has been made, and upon the application of persons claiming an interest in the disclaimed property, to make an order vesting the property in any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation, on such terms as the Court thinks just, subject to the following proviso, viz., "That where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or underlessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property."

Power of Court to vest lease in mortgagee by underlease or to deprive him of his security

In *Re Finley, Ex parte Clothworkers' Company* (*z*), a doubt was raised by Lord Justice Lindley whether, upon the true construction of this proviso, a mortgagee by sub-demise, who has obtained a vesting order pursuant to this section, is liable to the covenants and obligations of the original lease only as an assignee of the lease, or to the same extent as if he were the original lessee. The Act of 1883 is now supplemented by sect. 13 of the Bankruptcy Act, 1890 (*a*), which enacts as follows.—

Whether vesting order renders mortgagee liable as original lessee or as assignee

"The Court may, if it thinks fit, modify the terms prescribed by the proviso in sub-section 6 of the same section, so as to make the

(*x*) *Smelley v Hardinge*, 7 Q. B. D. 524, C. A. See 8 & 9 Vict. c. 106, s. 9.
(*y*) *Ex p. Walton, Re Levy*, 17 Ch. D.

746, C. A.
(*z*) 21 Q. B. D. 475, at p. 487, C. A.
(*a*) 53 & 54 Vict. c. 71

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person in whose favour the vesting order may be made subject only to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order."

The result appears to be that, where the mortgagor is the original grantee of the lease, in order to obtain a vesting order rendering the mortgagee liable only to the covenants and obligations of the lease as assignee, the mortgagee must claim that the usual vesting order may be modified in accordance with the provision of the Act of 1890, but that, where the mortgagee fails to put forward any such claim, or the Court for any reason refuses to make the order as asked, the usual vesting order will be made, and the mortgagee will become liable to the covenants and obligations as original lessee.

Assignment
of underlease
to trustee.

The liabilities and obligations referred to cannot be escaped by an assignment of the underlease to a trustee for the mortgagee before leave to disclaim is applied for by the trustee in bankruptcy (b).

Lessor may
apply for vest-
ing order.

It is now decided that the lessor is a "person claiming an interest in the disclaimed property," so as to be entitled to apply for an order vesting the lease in the sub-lessee or for delivery of the property if the sub-lessee refuses to take a vesting order (c).

No disclaimer
where the
mortgage is
by assign-
ment

The trustee in bankruptcy of an assignor by way of mortgage of leaseholds cannot disclaim the burden of the lessee's covenants, inasmuch as the mortgagee is the owner of the land so burdened, and the trustee's equity of redemption is a mere equitable right to which the covenants do not attach until reconveyance (d).

Comparative
advantages of
mortgages by
assignment
and under-
lease

The result of the foregoing observations seems to be that the form of the mortgage should still be in some degree determined by the amount of the rent and nature of the covenants to which the leaseholds are subject. If the rent be trifling, and the covenants not of a kind likely to be burdensome, the mortgage should be made by assignment, because it is expedient that the mortgagee should have the whole legal interest, rather than a mere derivative estate. It is expedient both for the purpose of a sale, and because it precludes the mortgagor from forfeiting, or doing

(b) *Re Smith, Exp. Hepburn*, 25 Q. B. 536, C. A.

(c) *Re Cook, Exp. Shilson*, 20 Q. B. D. 343; *Re Finley, Exp. Clothworkers' Co.*

21 Q. B. D. 475

(d) *Re Gee, Exp. Official Receiver*, 24 Q. B. D. 65.

other mischief with, the nominal reversion which is left in him by an underlease. If, however, the rent be large, or the covenants burdensome, for which the mortgagee as assignee will be liable (e), it is submitted that the mortgage should still be made by underlease. A mortgage by demise still confers on the mortgagee the advantage of not being rendered immediately subject, as in the case of a mortgage by assignment, to the liabilities and obligations of a lessee (f), and in the event of the mortgagor's bankruptcy, the effect of the statutory enactments above referred to is to give to the mortgagee by demise the option of accepting these liabilities and obligations of an assignee, or (if he prefers to do so) of abandoning his security and relying on the covenant for payment and proof in the bankruptcy for the debt.

iii.—Effect of Covenant not to Assign or Underlet.—Where a lease contains a covenant not to assign or sublet without licence, no mortgage, either by assignment or demise, will be valid unless the licence is obtained. But a covenant not to assign will not extend to subletting, and *vice versa* (g)

Effect of covenant against assignment, &c

Formerly, in order that an assignment should create a forfeiture, the instrument must have been valid and effectual at law (h). So where a lease contained a covenant on the part of the lessee not to let or otherwise part with "the said messuage or this present indenture of lease," it was held that an equitable mortgage by deposit of the lease was not a breach of the covenant (i); and upon a petition in bankruptcy by the equitable mortgagee by deposit (unaccompanied by any written memorandum) of a lease granted to the bankrupt, his executors, administrators, and permissive assigns, the usual order for sale was made (k). And the same rule would apparently have applied to any merely equitable security for money advanced where the mortgagee obtained no legal title.

But it remains to be seen whether this rule must not now be regarded as altered by the operation of sect 24 of the Judicature Act, 1873 (l), which, by causing equity to prevail in all Divisions

(e) See *ante*, p 155

(f) *Holford v Hatch*, 1 Doug 183, *Earl of Derby v Taylor*, 1 East, 502

(g) *Crusoe v Bugby*, 2 W. Bl 766. See *Church v Brown*, 15 Ves 258, 265

(h) *Doe d Lloyd v Powell*, 5 B. & C.

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(i) *Doe v Hogg*, 4 D. & R 226; *Doe v Lamung*, Ry & M 36

(k) *Exp. Drake*, 1 M. D. & De G. 439.

(l) 36 & 37 Vict. c 66.

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of the High Court of Justice, would, as it is conceived, render the executory assurance effected by an equitable mortgage a breach of the covenant

Renewal by
mortgagee

iv.—Renewal of Lease—It is decided that if the mortgagee of a leasehold estate obtain a renewal of the lease, although there subsisted only a tenant right, the renewed lease will be held subject to the like equity as subsisted in the old lease, and will be redeemable accordingly (*m*); the mortgagee, however, is not bound to renew, and in case he does, will be entitled to his costs in effecting the renewal, with interest (*n*) at the rate reserved on the original principal (*o*).

The above rule, however, as against the mortgagee, only applies when the mortgagee obtains a renewal behind the back, or by some contrivance in fraud, of those who were interested in the old lease, and where there is either a remnant of the old lease, or a tenant right of renewal on which the old lease could be engrafted. And, therefore, in a case where, after a mortgage of a lease, the landlord recovered in ejectment for non-payment of rent, and the nine months allowed by the Irish statute to redeem had elapsed without redemption either by mortgagor or mortgagee, and the mortgagee gave notice to the mortgagor that he should not redeem, and acted without fraud, a new lease, granted by the lessor to the mortgagee at the expiration of the nine months, was held to belong to him absolutely, although the agreement had been entered into during the nine months (*p*).

When a renewable lease is made the subject of mortgage, a covenant should be introduced on the part of the mortgagor for concurring at his own expense in all lawful acts for obtaining a renewal, for otherwise the mortgagee cannot compel him to do so (*q*). And there should be added an agreement that, if he refuses, it shall be lawful for the mortgagee to renew and to charge the estate with the costs and interest; for though the

(*m*) *Rushworth's case*, Freem Ch. 13, *Rakestraw v. Brewer*, 2 P Wms 511. The rule laid down in the text applies generally to renewals of leases by trustees, executors, tenants for life, and other persons in a fiduciary position. See *Holt v Holt*, 1 Ch Ca 190, *Keech v Sandford*, Sel Ca. in Ch. 61, 1 Wh. & Tud. L. C in Eq. 53, *Lee v. Vernon*, 5 Bro P. C 10. And see *Fitzgerald v. Ramsford*, 1 Ba & Be 37, n, *Tuster v. Marriott*, Amb. 668; *Rawe*

v Chichester, Amb 715, *Owen v. Williams*, Amb 734, *Pickering v Fowles*, 1 Bro C C 197.

(*n*) *Lacon v Mertins*, 3 Atk 4, *Godfrey v Watson*, 3 Atk 518, *Manlove v Bale*, 2 Vern 84.

(*o*) *Woolley v Drag*, 2 Anstr 551.
(*p*) *Nesbitt v. Tredennick*, 1 Ba. & Be 29, see at p. 47.

(*q*) *Lacon v. Mertins*, *sup*, *Manlove v Bale*, 2 Vern. 84.

mortgagee has, independently of any special agreement, a right to renew, in which case the estate will be redeemable only on payment of the costs and interest, yet he cannot bring an action to compel the mortgagor to renew, nor to recover expenses of a renewal made by himself without an express agreement to that effect. When freeholds are mortgaged with leaseholds, the provision charging the costs of renewal and interest on the whole of the mortgaged property should be inserted, and would be useful in preventing questions as to priority with subsequent incumbrancers (i)

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Where an action was brought by the transferee of a mortgage to compel the renewal of a lease for lives, it was held that the executors of the mortgagor were necessary parties because his estate was liable to the costs of renewal (s).

Necessary parties to action for renewal

A release by the mortgagee of the right of renewal will not be binding on the mortgagor or his representative claiming a right to redeem (t).

Release of right to renew

Where a tenant for life of renewable leaseholds mortgages his life estate, the liability to renew will follow the mortgagee in respect of the rents received by him, though, if the mortgagee's security is set aside, and he be obliged to refund the rents to the trustee in bankruptcy of the tenant for life, he will not be personally liable for any past default in not renewing, but the fine must be paid out of the refunded rents (u).

If, on the other hand, the mortgagor renew, although not in accordance with the covenant to renew, the new lease will be held to be a graft on the old one, and subject in equity to the same mortgage as affected the old lease (v). And such equity will defeat any lien of the mortgagor's solicitor for his costs (x).

Renewal by mortgagor

Where the mortgagor renders the renewal of the lease impossible by himself purchasing the reversion in fee, and so merging the lease, the estate so acquired is subject in equity to the mortgage (y).

Purchase of fee by mortgagor

A mortgagee of leaseholds for lives subject to renewal should

Notice to lessor

(i) *Dav* Conv 4th ed Vol. II pt II p 64.

(s) *Griegson v Hindley*, 7 Jur 248

(t) *O'Kelly v Featherstone*, 4 Bl N S 161

(u) *Halles v Barrow*, Tambl 264

(v) *Moody v Matthews*, 7 Ves 174, *Nightingale v Lawson*, cited there, *Sims v Helling*, 21 L J Ch 76, *Yem v Edwards* 1 De G & J 598, *Hughes*

v Howard, 25 Beav 575

(x) *Smith v Chichester*, 2 Dr & War 393

(y) *Trumper v Trumper*, L R. 8 Ch. A 870 And see *Evans v Walshe*, 2 Sch. & L 519, 12 R R 88, n, *Randall v Russell*, 3 Mer 190, and *Handman v Johnson*, 3 Mer 347, *Postlethwaite v Leu thewaite*, 2 J & H. 237, *Leigh v Bunnett*, 29 Ch D 231.

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give notice of the mortgage to the lessor, otherwise the lease may be forfeited by non-payment of fines by the mortgagor, and the mortgagee would have no remedy (*z*).

Effect of new
lease on cove-
nant to pay

v.—Surrender of Lease.—If a lessee mortgages his lease with a covenant for payment of the debt, and then both parties join in surrendering the lease for the purpose of having a new lease granted, and it is agreed that it shall be assigned to the mortgagee, and that the arrangement shall not prejudice any other security of the mortgagee, the covenant in the original mortgage deed is not extinguished by the surrender of the lease (*a*); and it is conceived that the result would be the same without such agreement, inasmuch as the covenant to pay is, as has been seen (*b*), not an essential part of the mortgage so as to stand or fall with it, but is an independent collateral security

Effect of
surrender.

A surrender by a mortgagor-lessee will not destroy charges previously created by the surrenderor (*c*). The estate surrendered has, in consideration of law, a continuance to protect such charges (*d*).

vi.—Covenants for Insurance against Fire.—In framing covenants relating to insurance of leasehold property, care must be taken that the stipulations are not repugnant to any covenants for insurance which are contained in the original lease. As, for instance, if the covenant in the lease be for the lessee to insure in the name of the lessor, it must not be stipulated that the mortgage insurance shall be in the name of the mortgagee; for if it were so, the mortgagor would be obliged to keep up two insurances instead of one. It is not right, however, for the mortgagee to rely on the covenant in the original lease; he should insist on having a covenant for insurance on which he can himself sue (*e*).

The statutory powers of mortgagees to insure the mortgaged property and to charge the same with the cost of insurance have been already set out and considered (*f*). It is obvious that where, under the covenants or provisions of a lease, a sufficient insurance is kept up, either by a lessee-mortgagor, or, as is

(*z*) See *Galbraith v Cooper*, 8 H. L. C 315

(*a*) *Greenwood v. Taylor*, 14 Sim. 505; *S. C.*, *sub nom. Att.-Gen. v Cox*, 8 H. L. C. 272.

(*b*) *Ante*, p 9.

(*c*) *Pheasant v Benson*, 14 East, 234, 238, *Doe v Pyke*, 5 M & S. 146

(*d*) Co. Lit 338 b, *Clements v. Matthews*, 11 Q. B. D. 808, 815.

(*e*) *Dav. Conv.* Vol. II pt ii. p. 121.

(*f*) *Ante*, pp 137 *et seq*

usual, by the lessor charging the lessee with the premiums, the statutory powers do not arise (*g*). CHAPTER XII

vii.—Statutory Covenants for Title —Under the Conveyancing and Law of Property Act, 1881 (*h*), in a conveyance by way of mortgage of leaseholds, there are deemed to be included covenants for the validity of the lease, and payment of the rent, and performance of the covenants therein. The form of the covenants is set forth in the section, which only applies to mortgages made after the commencement of the Act, as follows:—

That the lease or grant creating the term or estate for which the land is held is, at the time of the conveyance, a good, valid, and effectual lease or grant of the land conveyed, and is in full force, unforfeited, and unsurrendered, and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed and performed, have been paid, observed and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent, or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them.

(*g*) 44 & 45 Vict. c 41, s. 23 (*m*)

(*h*) 44 & 45 Vict c 41, s 7 (1, *n*)

CHAPTER XIII.

OF MORTGAGES OF INCORPOREAL HEREDITAMENTS.

What passes
by the word
"manor"

i.—Mortgage of Manor—The word "manor" has a wide signification, including (i) the demesne lands of which the lord is seised within the manor, (ii) the freehold of all lands held by copyholders within the manor; (iii) waste lands; (iv) all heriots, fines, rents, suits, and services; (v) courts baron, courts leet, and other franchises (*a*).

Customary freeholds held of a manor are not parcel of a manor, though the rents and services issuing out of such lands will pass by grant of a manor.

An advowson appendant to a manor will pass by conveyance of the manor (*b*).

Mortgagor
may hold
courts

The mortgagor of a manor, while in possession, may, it seems, hold courts (*c*).

Purchase of
copyholds by
lord after
mortgage of
manor

A mortgage of a manor will carry with it copyholds of that manor subsequently purchased by and surrendered to the lord (*d*); and the mortgagee is entitled to all accretions of the property (*e*).

A receiver may be appointed of a manor (*f*).

Receiver

ii.—Mortgage of Advowson.—An advowson is not an eligible security for money advanced, as it yields no profits out of which the interest can be kept down, and the policy of the law has imposed serious restrictions on the rights and remedies of a mortgagee of this kind of property.

Right of
mortgagor

Though the legal right to present to the benefice, whether

(*a*) Cru Dig tit xxxii ch 21

(*b*) Shep Touchst by Preston, 92

(*c*) Seriv Cop (5th ed) 91, note

(*d*) *Doe v. Pot*, 2 Doug 709 See

Serv Cop (4th ed) 43, (5th ed) 6

(*e*) *Exp Budge*, 1 M. D. & De G 333

(*f*) See *post*, p. 931.

appendant or in gross, is vested in the mortgagee (*g*), he can make no profit thereby, so as to renew or lessen the debt, not only because such a transaction would be void on the ground of simony, but also because, until foreclosure or sale, the mortgagee is but in the nature of a trustee for the mortgagor, who has a right to nominate, and may, in equity, compel the mortgagee to present the person so nominated (*h*), notwithstanding an express agreement to the contrary (*i*).

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to nominate
incumbent
on vacancy

If the mortgagee presents, and his clerk is inducted, the mortgagor may bring his action to compel resignation, but the action must be brought within six months from the death of the last incumbent, or it will be dismissed (*l*).

It is obvious, therefore, that an advowson can only be made available as a security by means of a power of sale, which, however, even if made under the direction of the Court, cannot be exercised during a vacancy so as to confer the right to present from that turn, contrary to the law of simony (*l*). But the power may be exercised if the benefice is not actually vacant, though a vacancy is known to be pending. So, where an advowson was sold after the incumbent had accepted another living, it was held that the original benefice, being voidable only, and not actually void, the next presentation was not dissociated from the advowson (*m*); and it has been held that the knowledge on the part of the purchaser of an advowson that the incumbent is on the point of death does not make the sale simoniacal (*n*).

Power of sale
not exercise-
able during
vacancy

It may be well to insert in a mortgage of an advowson a declaration that the statutory power of sale shall be exerciseable provided the incumbency shall then be full, and not otherwise.

iii.—Mortgage of Rectories Improprate and Tithes.—Rectories improprate and tithes or tithe rentcharge in lay hands may be mortgaged in like manner as any other kind of real estate.

Incumbrancers of tithes are not affected by statutory merger of the tithes so as to give the incumbrancers of the lands in

Merger of
tithes

(*g*) *Dyer v Lord Chaven*, 2 Dick 662, *Croft v Powell*, Com Rep 609

(*h*) *Joy v Cox*, Prec Ch 71, *Amhurst v Dawling*, 2 Vern 401

(*i*) *Mackenzie v Robinson*, 3 Atk 559 See *Gally v Selby*, Stra 403

(*l*) *Gardiner v Griffith*, 2 P Wms.

404, *Mutton v Chancel*, 1 Mer 493.

(*l*) *Bishop of Salisbury v Wolfenston*, 3 Burr 1504, *Mirehouse v Rennell*, 1 Moo & Sc 683

(*m*) *Alston v Attlay*, 7 A & E 289

(*n*) *Barton v Glubb*, Dick 516, *Fox v Bishop of Chester*, 1 Dow & C 416

CHAPTER XIII.

Statutes of
Limitation.

which the tithes are merged any priority over the holders of incumbrances affecting the tithes before the merger (o).

The law relating to rectories impropriate and tithes has received great emendations by Acts of Parliament passed for limiting the periods for making claim to such species of property, prior to such statutes, the rule prevailed, *nullum tempus occurrit ecclesie*, so that it was, in all cases of claim to impropriate tithes, necessary to show by what means the tithes came into lay hands; and, in cases of claim of exemption from tithes, to show the origin of such claim (p). But it is not now necessary to show the legal origin of the claim (q). The mere non-payment, for the prescribed period, where done adversely and of right, establishes a new ground of exemption (r). But the non-payment must be a total non-payment of tithes of every kind (s), and the consent or agreement in writing capable of defeating the evidence arising from the non-payment of tithe, or payment of modus, must cover the whole or some part of the period set up by the tithe-payer (t). And in a case in the Exchequer, the Court held that the claim of a *modus* from time immemorial might be pleaded notwithstanding the statute, and be supported by the same evidence that would have been sufficient before the statute, though not extending over so long a period as that named in the statute (u).

It has been likewise held that the same Act does not apply where the title to the tithes is in dispute, and not the liability to pay them (x). In like manner, 3 & 4 Will IV. c. 27 only applies as between adverse parties claiming an estate in the tithes (not being tithes due to a spiritual or eleemosynary corporation sole), and does not bar the tithe owner from recovering tithes as chattels from the occupier, although none have been set out for the space of twenty years (y).

The Act 2 & 3 Will. IV. c. 100, is unaffected by the provisions of 3 & 4 Will. IV. c. 27; the interpretation clause of the

(o) 2 & 3 Vict. c. 62, s. 1; 9 & 10 Vict. c. 73, s. 19.

(p) See 2 & 3 Will IV. c. 100, as to moduses and compositions real. 6 & 7 Will. IV. c. 71, as to impropriate tithes, and 41 & 42 Vict. c. 42, as to computation of tithes.

(q) *Salkeld v Johnston*, 14 Jur Pt I. 1. And see *Champneys v. Buchan*, 4 Drew. 104.

(r) *Fellows v. Clay*, 3 G. & D. 406.

(s) *Salkeld v Johnston*, 2 C B 749.

(t) *Toynbee v. Brown*, 18 L. J. Ex 99

(u) *Earl of Stamford v. Dunbar*, 13 M. & W. 822.

(v) *Knight v. Marquis of Waterford*, 15 M. & W. 419

(y) *Dean of Ely v. Cash*, 15 M. & W. 617.

latter Act, although enacting that the word "land" shall, in its meaning, extend to tithes, has reference to an estate in tithes, and not to tithes as a chattel; and sect. 2, therefore, does not embrace the case of a render of tithes as a chattel by the person bound to pay to the tithe owner (s)

Actions for tithes must be brought within six years from the time when such tithes became due (a), and the defendant may avail himself of the Act without pleading it (b)

iv.—Mortgage of Rentcharges.—A mortgage may be made of a subsisting rentcharge, or of a rentcharge created at the time and for the purposes of the security. In the former case the form of the mortgage will not materially differ from that of a mortgage of land, and the same form may be adopted in the case of a newly-created rentcharge, but in such cases the form of the security is more commonly that of an absolute grant of the rentcharge with power of repurchase (c).

Form of mortgage

The statute 3 & 4 Will. IV. c. 27, sect. 42, provides that no arrears of rent are to be recovered after more than six years from the time at which they become due, or an acknowledgment in writing is given by the debtor. This provision was apparently intended to apply exclusively to rentcharges, and not to other rents (d).

Arrears of rentcharge

By the Conveyancing and Law of Property Act, 1881 (e), s. 44, the insertion in grants of rentcharges of powers of distress and entry, and of limitations of terms to trustees to secure rentcharges, are rendered unnecessary. When the mortgage is of a subsisting rentcharge, it will be well for the mortgagee to take a power of attorney from the mortgagor, so as to enable him to enforce these rights and remedies against the land out of which the rentcharge issues.

Statutory remedies

(s) *Dean of Ely v. Bliss*, 2 De G M & G 459

(a) 53 Geo III c 127, s 5

(b) *Goode v Waters*, 20 L J Ch 72

(c) See as to annuity deeds, *ante*,

pp 32 *et seq*

(d) *Paget v Foley*, 3 Sc 120

(e) 44 & 45 Vict c 41 See these provisions set out in full, *ante*, p. 34.

CHAPTER XIV

OF MORTGAGES OF CHATTELS.

SECTION I.

OF THE NATURE AND INCIDENTS OF MORTGAGES OF CHATTELS
GENERALLY.Meaning of
"chattels"

i.—Introductory Remarks—In its widest sense, the expression "chattels" means all personal property, including leasehold and like interests in land which are known as chattels real, and debts and other choses in action, as well as goods capable of being transferred by actual delivery, which are often distinguished by the title "chattels personal." In a more usual and restricted sense the expression "chattels" is used to denote only the latter kind of personal property, and it is in this sense that the word is used in this present Chapter.

Securities
on chattels

Chattels may be made the subject of a security for a loan or debt, either by mortgage or by pledge. A mortgage of chattels, like a mortgage of land, passes the property therein to the mortgagee, subject to redemption. The goods may, like any other mortgaged property, be retained, as is usually the case, by the mortgagor, in which case, as will be seen hereafter, the validity of the mortgage will depend on its conformity with the requirements of the Bills of Sale Acts, 1878 and 1882 (*a*). Independently of those Acts, or of the inferences to be drawn therefrom (*b*), a mortgage of chattels might have been made by assignment contemporaneous with or subsequent to delivery of the goods to the mortgagee (*c*). But it is somewhat doubtful how far, having regard to the provisions of those Acts, such transactions can be validly effected at the present day (*d*).

(*a*) 41 & 42 Vict. c. 31, 45 & 46 Vict. c. 43, the provisions of these Acts are considered *post*, pp. 189 *et seq.*

(*b*) See *Great Northern Rail Co v*

Coal Co-operative Soc, (1896) 1 Ch. 187

(*c*) The delivery may be actual or constructive. See *post*, p. 1461.

(*d*) See this question discussed *post*, p. 192.

The question as to the validity of a mortgage of chattels, where possession of the goods is retained by the mortgagor, has generally arisen between the mortgagee and some other creditor of the mortgagor who has obtained possession of the goods by execution or otherwise subsequently to the mortgage, or between the mortgagee and the general creditors of the mortgagor, he having become bankrupt. These cases, though frequently confounded, require a distinct consideration, for it frequently happens, as will presently be seen, that mortgages which might be supported against execution creditors, notwithstanding the non-delivery of possession, are void under the enactments of the bankruptcy law (e).

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Mortgages of chattels where possession is retained by the mortgagor.

The question, as it regards the mortgagee and any other individual creditor or creditors, turns partly upon the principles of the common law, and partly on the well-known statute 13 Eliz c 5. The question, as between the mortgagee and the trustee in bankruptcy of the mortgagor, acting on behalf of the creditors generally, is regulated by the provisions of the Bankruptcy Act, 1883 (f), which will be hereafter considered.

Fraudulent mortgages of chattels

ii.—Mortgages fraudulent at Common Law.—At common law, independently of any statute, a security to a creditor will be void if fraudulent, or made upon a secret trust for the debtor.

Fraud or secret trust

The retention of possession by the mortgagor after assignment is material as raising a *prima facie* presumption that the transaction is tainted with fraud. Immediate transmutation of possession is, however, at the present day, seldom contemplated by the parties to a mortgage transaction, but the mortgagor is usually allowed to retain possession of the goods until default in payment of the mortgage moneys, or until breach of some stipulation contained in the deed.

Retention of possession by mortgagor

It is unnecessary that the assignment of the chattels should be followed by possession, in order to make it valid against the assignor himself, or against his creditors, who are cognisant of and take part in the arrangement under which it is made, or which proceeded upon the assumption of its validity, or against strangers (g).

Effect as between parties to deed, &c.

The presumption arising from retention of the goods may

Effect as against

— (e) Byth & Jarm (4th ed.), Vol III p 765
(f) 46 & 47 Vict c 52 See post, pp. 177 *et seq.*

(g) *Steel v Brown*, 1 Taunt 381, *Robinson v M'Donnell*, 2 B & Ald 134, *Beasey v Wandham*, 6 Q B 166; *White v Morris*, 11 C B 1015 See also *Oliver v. King*, 8 De G M & G 110

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creditors
generally

be rebutted, and the security may be supported as against creditors who have not assented to the transaction, by showing that the retention of possession by the mortgagor is consistent with the nature of the transaction. Such evidence may be supplied either by the express terms of the mortgage deed, or by parol evidence proving that the assignment, though in terms absolute, was really a mortgage (*h*).

Clause for
possession till
default

So where a mortgage of chattels contained a clause that the mortgagor should keep possession until default in payment, or until sequestration, his possession did not show fraud, and unless fraud be proved, the mortgagee's title prevailed against an execution creditor (*i*). Nor is the mortgagee bound to take possession on the first or a subsequent default made in payment of the debt or an instalment of the debt (*h*).

The effect of such a clause is to operate as a redemise by the mortgagee, who cannot sue for the chattels until default has been made, or the expiration of the time for payment; and the mortgagor may maintain an action if his possession is interfered with in the interval. But the mortgagor is only entitled to the use of the chattels; if he or his trustee in bankruptcy sell them during the term, it will be a disclaimer of the tenancy, and the mortgagee or his assignees can sue for the conversion (*i*).

The proviso for the mortgagor to retain possession until default is not inconsistent with a proviso for taking possession on the happening of a certain event (*m*).

Possession
consistent
with deed,
where no
such clause.

Even when the mortgage does not contain the clause for possession by the mortgagor until default, the mortgage will be supported, if the possession is consistent with the requirements and probabilities of the case (*n*); as where it was necessary for the mortgagor, who was an hotel-keeper, that he should remain in possession (*o*).

So also a security may be supported where, from the very nature of the transaction, a delivery could not be contemplated.

(*h*) *Cole v Davies*, 1 Ld Raym 724
See *Meggott v Mills*, 1 Ld Raym 286
It must, of course, be borne in mind
that all mortgages of chattels must
now conform to the requirements of
the Bills of Sale Acts, see *post*, pp 189
et seq

(*i*) *Martindale v. Booth*, 3 B & Ad
498, *Reed v. Wilmot*, 5 Moo & P 553,
Minshall v Lloyd, 2 M & W 450,
Bradley v Copley, 1 C B 685, *Gale*
v. Burnell, 7 Q. B. 850; *Tapfield v.*

Hillman, 6 Man & Gr 245, *Alton*
v Harrison, L R 4 Ch A 622

(*h*) *Martindale v Booth*, *sup*; *Tap-*
field v Hillman, *sup*

(*i*) *Fenn v Buttlestone*, 7 Exch 152;
Brierley v Kendall, 17 Q B 937

(*m*) *Re Francis*, 10 Ch D 408, C A

(*n*) *Steward v Lombe*, 1 Br. & B
506, 4 Moo 281, *Cook v. Walker*,

3 W R 357

(*o*) *Cook v. Walker*, *sup*.

Thus (*p*) where a supercargo of a ship bound to the East Indies shipped goods, and made a bill of sale of them and of their profits to one Royston, by way of mortgage; the voyage was made, and the supercargo sold the goods, and bought others, and made several barter and exchanges, and afterwards died at sea; in a question between the mortgagee and a judgment creditor, the assignment was held valid, for though sold to Royston, they were intrusted to the supercargo to negotiate and sell them for Royston's advantage, and the possession was not for the purpose of giving him a false credit

So in the case of land being mortgaged with a mill standing on it, not affixed to the freehold, in which instance the possession of the mill by the mortgagor, although a mere chattel, was held to be consistent with the deed (*q*).

The result of all the cases seems to be, that possession of goods and chattels after an assignment of them does not of itself at common law constitute fraud as against creditors, but is only *prima facie* evidence of it, capable, like any other evidence of a similar kind, of being rebutted or explained.

iii.—Mortgages fraudulent under Stat. 13 Eliz. c. 5.—A mortgage of chattels, though complying in all respects with the requirements of the Bills of Sale Acts, may be liable to be set aside as fraudulent against creditors under the statute 13 Eliz. c. 5.

By that statute (which will be more fully considered hereafter with reference to its bearing upon the avoidance of securities generally as against creditors on the ground of fraud (*r*)) it is, amongst other things, provided that every conveyance of goods and chattels made to the end, purport, and intent to delay, hinder, or defraud creditors, shall be void as against persons who may be defrauded and their representatives. But the Act is not to extend to any such conveyance made upon good consideration and *bonâ fide* to a person not having at the time of such conveyance notice of any fraud

Conveyances
in fraud of
creditor void.

Soon after the passing of this statute, the question how far the retention of possession by a grantor of chattels was to be

How far re-
tention of pos-
session raises

(*p*) *Bucknel v. Royston*, Prec Ch. 285. And see *Lemprière v. Pasley*, 2 T R 485, *Belcher v. Oldfield*, 6 Bing. N C 102.

(*q*) *Stewart v. Lombé*, 1 Br & B 506, *Rufford v. Bishop*, 5 Russ. 346, 354.

(*r*) See *post*, pp. 567 *et seq.*

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presumption
of fraud
within the
statute

deemed to raise an inference of fraudulent intent to defraud creditors came before the Courts for decision, and the principles governing the application of the statute underwent much discussion in *Tayne's Case* (s). In that case it was decided that the retention of the possession by the grantor of chattels personal, after assignment, is *prima facie* proof of fraud. But it is now settled that the mere circumstance of possession of chattels amounts to no more than *prima facie* evidence of property in the person in possession (t).

Distinction
between sale
and mortgage
as regards
retention of
possession.

There is a clear distinction between absolute and conditional transfers in regard to the question of their being accompanied by immediate possession; for, whereas the retention of possession by a vendor is generally considered as indicative of fraud, because it is at variance with the sale, such act is generally consistent with a mortgage so far as the statute is concerned, inasmuch as it is usually intended that the mortgagor is to retain the possession and enjoyment of the chattels until default in payment. Although, therefore, retention of possession is a very material circumstance where the conveyance is absolute, yet, where the transaction is a mortgage, the absence of change of possession is, generally speaking, evidence of fraud only if the possession is inconsistent with the mortgage deed.

In *Eduards v Harben* (u), Buller, J, expressly recognized the distinction between absolute and conditional alienations, or, as his lordship expressed it, "between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time; for, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed." The same learned judge, in his well-known treatise on the law of *Nisi Prius*, lays it down "that the donor's continuing in possession is not in all cases a mark of fraud, as where a donee lends his donor money to buy goods, and at the same time takes a bill of sale of them for securing the money" (x). The principle in question, too, is corroborated by those in which goods and chattels had been protected against the execution creditor of a person on whom they have been settled for life, and in whose possession they

(s) 3 Rep 80, see notes to S C, 1 Sm. L. C. 1. See also *Eduards v Harben*, 2 T. R. 587; *Bamford v Baron*, 2 T. R. 594, n., *Manton v Moore*, 7 T. R. 67, *Woodall v. Smith*, 1 Camp 332, *Ma-*

indale v Booth, 3 B. & Ad 498.

(t) *Lady Aundell v Phipps*, 10 Ves 139.

(u) 2 D. & E 587.

(x) Buller, N. P. 268.

were, on the ground that the enjoyment was consistent with the deed (y)

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In connection with the question as to the avoidance of a mortgage of chattels on the ground of mere inconsistency of the mortgagor's possession with the terms of the deed, it must be borne in mind that no mortgage can now be made of chattels so as to be valid as against execution creditors, except in conformity with the statutable form (z), which clearly, having regard to the provisions of the Bills of Sale Acts, contemplates the retention of the chattels by the mortgagor until default

Effect of Bills of Sale Acts as regards retention of possession

Moreover, in the case of absolute assignments of chattels, the notoriety of the sale was always regarded as an important element in rebutting the presumption arising from the retention of possession (a). This notoriety is now necessarily incident to all assignments of chattels, whether absolute or by way of mortgage, where the assignor retains possession, by virtue of the requirements of the Bills of Sale Acts rendering it essential to the validity of such instruments as against creditors that they should be duly registered so as to insure publicity (b).

Notoriety by registration

So far as the statute of Eliz. concerns mortgages, the validity of the transaction will depend upon whether the whole circumstances of the case are such as to induce a jury to hold that the presumption of fraud, *prima facie* to be inferred from the retention of possession by the grantor, is rebutted (c).

iv.—Mortgages fraudulent in Bankruptcy—Reputed Ownership—The law of reputed ownership has considerable effect upon mortgages of chattels.

Reputed ownership

Prior to the Bankruptcy Act, 1869 (d), the doctrine of reputed ownership applied to all bankrupts, and to all choses in action.

The law was by that Act confined to traders, and, so far as relates to things in action, to trade debts.

By the Bankruptcy Act, 1883 (e), it is enacted that—

Sect. 44 (iii) The property of a bankrupt divisible amongst

Goods in order and disposi-

(y) *Cadogan v. Kennett*, Cowp 432; *Earl of Shaftesbury v. Russell*, 1 B & C 666. See also *Reed v. Wilmott*, 5 M & P 553, *Martindale v. Booth*, 3 B & Ad 498, *Riches v. Evans*, 9 C & P 640, *Cair v. Burdiss*, 1 C M & R 782.

(z) See *post*, pp 229 *et seq*.

(a) *Latimer v. Batson*, 4 B & C 652. See *Watkins v. Bush*, 4 Taunt 823, *Joseph v. Ingram*, 8 Taunt 838, *Leonard*

v. Baker, 1 M & S 251, *Kidd v. Rawlinson*, 2 B & P. 59, *Macdonald v. Swiney*, 8 Ir. C L 73.

(b) See *post*, pp. 189 *et seq*.

(c) *Latimer v. Batson*, 4 B & C 652, *Leonard v. Baker*, 1 M & S 251, *Watkins v. Birch*, 4 Taunt 823, *Dewey v. Baynton*, 6 East, 27, *Fortescue v. Barnett*, 3 My & K. 43.

(d) 32 & 33 Vict c 71.

(e) 46 & 47 Vict c 52.

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tion of bank-
rupt divisible
among
creditors

his creditors shall comprise the following particulars (amongst others) —

All goods, being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof, provided that things in action, other than debts due or growing due to him in the course of his trade or business, shall not be deemed goods and chattels within the meaning of this section

Meaning of
"goods," for
purposes of
the Bank-
ruptcy Acts
Fixtures

The word "goods," which is here substituted for the expression "goods and chattels," in the Act of 1869, is defined as including all chattels personal (*f*).

The expression "personal chattels" is defined by the Bills of Sale Act, 1878 (*g*), to include certain specified kinds of personal property, and, amongst others, fixtures if separately assigned, but that definition is only for the purposes of the Bills of Sale Acts (*h*). Fixtures annexed to the freehold are not within the reputed ownership clause of the Bankruptcy Act, though removable by the tenant (*i*), and even trade fixtures, though annexed to the freehold since the date of a mortgage of land, will pass to the mortgagee, not to the trustee in bankruptcy (*k*). Possession of fixtures does not raise an inference of ownership (*l*), and they are consequently not within the clause, though assigned by a separate deed (*m*). But chattels which have been at one time annexed to the freehold, but which have been subsequently severed therefrom, cease upon such severance to be fixtures, and come within the clause (*n*). Chattels settled to devolve with land as heirlooms have been held not to be within the clause (*o*).

Trade
utensils

Utensils of trade or other moveables mortgaged by a bankrupt are in general within the clause (*p*).

(*f*) 46 & 47 Vict c. 52, s 168

(*g*) *Post*, p 203

(*h*) *Meux v Jacob*, L R 7 H L 481

(*i*) *Exp Couell*, 17 L J Bk 16, *Boydell v M'Michael*, 1 C. M. & R 177, *Ryall v Rowles*, 1 Ves Sen 349, *Exp Quincy*, 1 Atk 477, *Horn v Baker*, 9 East, 215, *Coombs v Beaumont*, 5 B & Ad 72, *Exp Sykes*, 18 L J Bk 200, *Hubbard v Bagshaw*, 4 Sim 326, *Clark v Crounshaw*, 3 B & Ad 804. As to what are fixtures, so as not to be within the clause, see *Rufford v Bishop*, 5 Russ 346, and see *ante*, pp 120 et seq.

(*k*) *Cullwick v Swindell*, L R 3 Eq 249, *Chmies v Wood*, L R 3 Ex 257

(*l*) *Boydell v M'Michael*, 1 C M & R 177.

313, *Exp Wilson, Re Butterworth*, 4 D. & C 143

(*n*) *Ryall v Rowles*, 1 Ves Sen 149, *Horn v Baker*, 9 East, 215, *Hubbard v Bagshaw*, 4 Sim 386. And see *Trappes v Harter*, 2 Cr & M 153, which, however, so far as it bears on the doctrine of reputed ownership as regards fixtures, must be regarded as overruled. See *Walmsley v Milne*, 7 C B N S 121, *Cullwick v Swindell*, *sup*, *Whitmore v Empson*, 23 Beav 313

(*o*) *Earl of Shaftesbury v Russell*, 1 B & Cr 666

(*p*) *Horn v Baker*, *sup*, *Langham v. Biggs*, 1 B & P 82, *Exp Lovering*, L R 9 Ch A 621, *Bryson v Wythe*, 9 East, 240, *Langard v Messiter*, 1 B & Cr 308; *Shuttleworth v Heiman*,

In one case, where a deposit was made of an assignment of a lease, in which assignment trade fixtures were included, the trade fixtures were held to be within the clause (q).

The expression "chattels personal" in the Bankruptcy Act appears to be used in its widest sense, so as to include personal estate of every description except chattels real and fixtures (r), and also except choses in action due or growing due in the course of trade or business. This expression thus includes all personal chattels within the meaning of the Bills of Sale Acts, except fixtures

What are chattels personal within the Bankruptcy Acts?

The commencement of the bankruptcy is thus defined by the Act —

Sect 43 "The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at the time of, the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at the time of, the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition, but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor."

Commencement of the bankruptcy

Goods which come into the possession of the debtor after the commencement of the bankruptcy are, apparently, not property of the bankrupt within the 44th section, so as to be divisible among his creditors (s)

Goods acquired after bankruptcy.

In order to support the claim of a trustee in bankruptcy as against a mortgagee of chattels, it must appear that the chattels are in the possession and order and disposition of the bankrupt.

Possession, order, and disposition of bankrupt

The reputed ownership clause is confined to cases where the bankrupt is in sole possession as sole reputed owner, and therefore does not apply to the case of a bankrupt in joint possession of goods by himself and his partner (t), although his partner be a dormant partner (u), nor to the case of dissolution

Possession, &c of partner.

(q) *Re Trethowan*, 5 Ch D. 559, appealed from, but compromised

p. 187

(r) See further as to the meaning of "fixtures," ante, p 120

(t) *Reynolds v. Bowley*, L R 2 Q B. 474, Ex Ch, *Exp. Dorman, Re Lake*, L R 8 Ch A 51

(s) *Lyon v Weldon*, 2 Bing 384 See Williams on Bankruptcy (5th ed),

(u) *Reynolds v Bouley*, sup, *Exp. Hayman*, 8 Ch. D 12, C A.

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when one partner is collecting the assets (x); but where one partner after dissolution uses the plant and stock of the firm in his separate trade, they are in his separate order and disposition (x), and so where one partner purchases the assets under a decree and is allowed, before payment, to go into possession as purchaser (y); and also where the real owner of property allows it to be employed in a business in which another person is partner with himself; the property is in the reputed ownership of the partnership (z).

But in *Ryall v. Rowles* (a), it was held that if a moiety of stock in trade be mortgaged by one partner to another, and they both continue the apparent owners, this is not a sufficient possession to give a specific lien against general creditors; and that if an undivided share of stock in trade be assigned to a stranger, it is necessary that the mortgagee should be admitted into the business to render the security valid.

Where a father and son were in partnership under articles which provided that the machinery and stock in trade should belong to the father, who died, having by his will authorized his executors (the copartner and widow) to carry on the business, which they did, the machinery and stock were held on their bankruptcy not to be in their order and disposition, but in that of the old firm (b).

Property of a trust lodged, without the consent of the *cestui que trust*, with the firm of which the trustee was a partner is not within the clause (c).

Possession of wife's property by husband.

Where furniture is settled to the separate use of a wife, and the joint possession of the husband and wife is inconsistent with the deed, such possession of the husband does not fall within the clause; the wife is agent for the trustees (d). *Secus*, where the possession of the husband is not in accordance with the deed (e). Articles *bonâ fide* substituted for the settled articles will stand on the same footing (f).

(x) *Exp Cooper*, 1 M D & De G. 358
See *Exp Sprague*, 4 De G M & G 886

(y) *Graham v McCulloch*, L R 20 Eq 397 See *Re Breuster's Assignees*, 4 De G M & G 866

(z) *Exp Hayman*, 8 Ch D 12, C A
(a) 1 Ves Sen. 349.

(b) *Exp Manchester Bank*, 12 Ch. D. 917

(c) *Exp. Moore*, 2 M. D & De G. 616.

(d) *Cadogan v Kennett*, Cowp 432;
Jarman v Wollaton, 3 T R 618,
Haselinton v. Gill, 3 T R 620, n.,
Simmons v Edwards, 16 M & W 838,
Exp Cox, Re Reed, 1 Ch D 302 But
see *Ashton v Blackshaw*, L R 9 Eq.
510, where the decision of *Malins v -C.*,
is not reconcilable with these cases

(e) *Darby v Smith*, 8 T. R. 82;
observed on in *Exp Symmons*, 14 Ch.
D 693, C A

(f) *Haselinton v. Gill*, 3 T.R. 620, n.,

In order to exclude the operation of this clause, a real possession by the creditor, even though it be friendly, is sufficient (g).

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The goods need not be in the actual possession of the bankrupt; it will be sufficient if they are constructively in his possession, as if they are in the possession of his servant (h); or, generally, of an agent for sale (i); or of a warehouse keeper (k), or of a carrier (l); or of a person to whom they are let on hire (m), or of a person to whom they are sent on sale or return, unless by special custom (n). But goods in the possession of a factor or agent, the relation between whom and his employer is notorious, are not in the constructive possession of the latter (o). Goods in the possession of a person on the hire-purchase system are generally deemed to be in the possession of that person (p), unless by special custom, as in the case of pianos (q), and furniture supplied to hotel keepers (r).

Constructive possession.

The question of reputed ownership is entirely one for the jury (s).

The reputed ownership clause does not apply where the possession is in accordance with the custom of the locality or of the trade, as of articles of machinery which by custom are let with the mill (t); and a practice in the factory districts is referred to of inserting advertisements, stating the machinery to be the property of the lessor, and let by him for a term only (u).

Possession by custom of locality or trade

And the clause does not apply to barges bearing the debtor's (x) name and so registered, there being a custom in the coal trade for coal merchants to hire barges, and paint their own name thereon (y); nor to books deposited with a bookseller to sell

England v. Downs, 6 Beav 269, *Duncan v. Cashin*, L. R. 10 C P 554.

(g) See *post*, p 187

(h) *Exp. Bolland, Re Gallehouse*, 24 L T 335, *Jackson v. Irvine*, 2 Camp. 48

(i) *Exp. Roy, Re Silence*, 7 Ch D 70

(k) *Knowles v. Horsefall*, 5 B & Ald 534

(l) *Hervey v. Liddard*, 1 Stark 123

(m) *Horsby v. Miller*, 1 E & E. 192.

(n) *Exp. Sheppard*, 4 L T N. S. 108, *Exp. Wingfield, Re Florence*, 10 Ch D 591, C A

(o) *Re Fawcus, Exp. Buch*, 3 Ch D 795, *Exp. Bright, Re Smith*, 10 Ch D 568

(p) See *Exp. Brooks, Re Fowler*, 23 Ch. D 261, C A

(q) *Exp. Hattersley, Re Blanshard*, 8 Ch D 601

(r) *Chawcon v. Salter*, 18 Ch D 30, C A. See *Exp. Pouell, Re Matthews*, 1 Ch D 501, *Exp. Turquand, Re Parker*, 14 Q B D 636, C A

(s) *Price v. Groom*, 17 L J Ex. 346, *Edwards v. Scott*, 1 Man & Gr. 962

(t) *Rufford v. Bishop*, 5 Russ 346, 354, *Horn v. Baker*, 9 East, 215; *Storer v. Hunter*, 3 B. & Cr. 368; *Watson v. Peache*, 1 Bing N C 327; *Mullet v. Green*, 8 Car & P 382

(u) 2 Day Conv 3rd ed p 710, 4th ed p 162

(x) *Kirkley v. Hodgson*, 1 B. & Cr 588

(y) *Watson v. Peache*, 1 Bing. N C. 327.

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on commission, such a custom being notorious (*z*); nor to horses let to brewers (*a*). A custom of letting cabs by cab proprietors upon a deferred payment system was held not to be proved (*b*).

Similarly, a custom of leaving goods sold in vendor's possession for convenience of vendee, as in case of pigs (*c*); whiskey in bonded warehouse (*d*) (and it is immaterial whether a delivery order is given); tea warrants (*e*); and hay (*f*), takes the case out of the statute.

But a custom, in order to take a case out of the order and disposition clause, must be clearly proved (*g*), either by reported cases, or as a question of fact (*h*); and must be one which the ordinary creditors may be reasonably presumed to have known (*i*).

A custom in certain localities to stack the sold produce of a farm apart from the unsold produce, was successfully insisted on (*j*). On the other hand, proof of a custom to let old collieries furnished and virgin collieries unfurnished, is fatal to the claim of a lessor to the furniture of a virgin colliery (*k*).

So, goods in the hands of malting agents are not in their order and disposition, as they are not usually the owners of the barley and malt on their malting (*l*).

Where goods lying with a wharfinger in the name of A. had been purchased by B, who permitted them, for several months after, to remain at the wharfinger's in the name of A, during which time A. disposed of a part, but on notice of his insolvency, B carried the order for the delivery of the goods to the wharfinger, and had the goods transferred into his own name nine days after A. had become bankrupt, it was held that there was a complete transfer before the bankruptcy (*m*).

Unfinished
chattel.

So, also, the reputed ownership clause does not apply where an unfinished chattel, as, for instance, a ship in a builder's yard which has been mortgaged or sold, is left in the assignor's possession for a reasonable time for completion (*n*).

(*z*) *Whitfield v Brand*, 16 M. & W. 282, *Exp Greenwood*, 6 L T N S 558.

(*a*) *Exp Elmer*, 13 W R 476, *Exp Watkins*, L R 8 Ch. A 523, n.

(*b*) *Re Hull*, 1 Ch D. 503, n, C A. 501, C A.

(*c*) *Priestley v. Pratt*, L R. 2 Ex. 101.

(*d*) *Exp Faux*, L R 9 Ch A 602.

(*e*) *Re Burt*, 15 L T. N S 368, Bky.

(*f*) *Fennell v Fox*, 1 F & F. 617, *Re Terry*, 11 W. R. 113.

(*g*) *Re Hull*, 1 Ch D 503 n, C A.

(*h*) *Exp Powell*, *Re Matthews*, 1 Ch D 501, *Exp Wingfield*, 10 Ch D. 501, C A.

(*i*) *Re Terry*, *sup*

(*k*) *Coombs v. Beaumont*, 5 B. & Ad. 72.

(*l*) *Harris v. Truman*, 7 Q B D. 341, affirmed 9 Q B D 264, C A.

(*m*) *Jones v Dwyer*, 1 Rose, 339.

(*n*) *Woods v. Russell*, 5 B & Ald. 942; *Clarke v Spence*, 4 A & E. 448;

When the sheriff has taken possession of goods, they are no longer in the order and disposition of the debtor, at all events, if the seizure by the sheriff is rightful (*o*)

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Possession
by sheriff

But where goods were taken in execution, and assigned by the sheriff and debtor to the creditor, who put his initials on every article and demised them to the debtor at a certain rent, who remained in possession to the time of his bankruptcy, it was held that the debtor was the *reputed owner*, there not being a notorious change of ownership (*p*)

Materials which the landlord may seize on forfeiture are not within the order and disposition clause, for until seizure the landlord is not the true owner (*q*)

Builder's
contract

The following cases have been held not to fall within the clause — goods in possession of a receiver appointed at the instance of a creditor (*r*); goods distrained for rent, but not sold (*s*); goods in the possession of a factor or agent (*t*), if the relation is notorious (*u*). So, the clause does not apply when the goods are in the possession of the true owner, subject to a lien by agreement (*x*), nor when the possession, as of a lessee, is with the consent of the mortgagor, who is permitted by the true owner (the mortgagee) to retain possession (*y*), nor when the person in whose possession the chattels were by the consent of the true owner pledges them, and they are in the possession of the pawnee at the time of the pawner's bankruptcy (*z*)

Other cases
of possession

Where the mortgage was taken in the name of a trustee whose name was over the stores, and the bankrupt served behind the bar, there was no reputed ownership (*a*). And pictures lent to an artist for exhibition in a public gallery are

Holderness v Rankin, 2 De G F & J 258, *Swanston v Clay*, 4 Giff 187, *varied*, 3 De G J & S 558

(*o*) *Fletcher v Manning*, 12 M & W 571 And cf. *Exp Foss*, *Re Baldwin*, 2 De G & J 230, and *Exp Edey*, *Re Cuthbertson*, L R 19 Eq 264 See also *Meggy v Imperial Discount Co*, 3 Q B D at p 714

(*p*) *Lungard v Messiter*, 1 B & Cr. 308, *Exp Lovering*, *Re Jones*, L R 9 Ch A 621, *Exp Brooks*, *Re Fowles*, 23 Ch D 261, C A

(*q*) *Exp Newitt*, 16 Ch. D 522, C A

(*r*) *Taylor v Echelesley*, 5 Ch D 740

(*s*) *Re Stockton Iron Furnace Co.*, 10 Ch. D. 335, C A, *Leham v. Philpott*,

L R 10 Ex 242, *Sacher v Chudley*, 11 Jur N S 654

(*t*) *Ryall v Roules*, 1 Ves Sen 349, 1 Atk 165, *Mace v Cadell*, Cowp 232, *Whitfield v Brand*, 16 M & W 282 And see *Exp Bright*, 10 Ch D 566, C A, *Re Kullberg*, 12 W R. 137.

But see *Exp Roy*, 7 Ch D 70

(*u*) *Re Faucus*, 3 Ch D 795

(*x*) *Hawthorn v Newcastle Rail Co*, 3 Q. B 734.

(*y*) *Fraser v Swansea Canal Navigation Co*, 1 A & E 354

(*z*) *Greening v Clark*, 4 B. & Cr 316

(*a*) *Edmunds v Best*, 7 L T N S 279 See *Shrubsole v Sussams*, 16 C B N. S 452

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not in the order and disposition of the artist on his bankruptcy (*b*)

Possession in
"trade or
business"

In order that goods may fall within the reputed ownership clause they must be in the possession, &c of the bankrupt in his trade or business. The expression "business" has a more extensive signification than "trade," and will include farming, banking, and other occupations which are not strictly trades (*c*).

The business must, in order to be within the section, be carried on with a view to profit (*d*).

Articles not in their nature necessarily connected with the particular business of the trader require clear evidence to prove the reputed ownership (*e*).

Possession by
"consent of
true owner,"

In order that goods not belonging to a bankrupt should pass to his trustee, they must have been at the commencement of the bankruptcy in the possession, &c of the bankrupt by consent of the true owner. These words are not mere formal words (*f*), but mean that there must have been either actual consent, or acquiescence amounting thereto, whether intentional or arising from some impropriety or laches on the part of the true owner (*g*).

Meaning of
"true owner,"

The interest of the true owner may be legal or equitable. So where a mortgagor is, by the mortgage deed, entitled to remain in possession till demand, he is in possession with the consent of the true owner, the mortgagee (*h*). In some cases, it seems to have been considered that where the mortgagee has covenanted to allow the mortgagor to remain in possession, the section does not apply, but these decisions cannot now be relied on (*i*).

It is true, that where there is a mortgage of chattels, with a proviso for quiet enjoyment by the mortgagor till default, or where the mortgagor takes, under the mortgage deed, an interest in the chattels, determinable upon his default in payment or by notice from the mortgagee, the mortgagor is, in a sense, the true

(*b*) *Re Cook, Exp Dudgeon*, W N (1884) 124.

(*c*) *Harris v. Amery*, L R 1 C P. 148, at p 154. See *Re Jenkinson*, 15 Q B D 441.

(*d*) *Re Wallis, Exp Sully*, 14 Q B D 951.

(*e*) *Exp Lovering, Re Murrell*, 24 Ch D 21, C A.

(*f*) *West v. Skip*, 1 Ves Sen 243, *Smith v. Topping*, 5 B & Ad 674, 678.

(*g*) *Joy v. Campbell*, 1 Sch. & L. 328; *Hamilton v. Bell*, 10 Exch. 545,

549, 552, *Exp Geaves*, 8 De G M & G 291, *Re Bankhead's Tr*, 2 K & J. 560, *Exp Bell*, 17 L J Bky. 9.

(*h*) *Freshney v. Carrick*, 1 H & N 653, *Re Atkinson*, Fonb Bky 271, *Cook v. Walker*, 25 L T. 51, *Honaby v. Miller*, 1 E & E 192, *Spackman v. Miller*, 12 C B N S 659, *Exp Harding*, L R 15 Eq. 223, *Exp Union Bk of Manchester, Re Jackson*, L R 12 Eq 354.

(*i*) *Ashton v. Blackshaw*, L R 9 Eq. 510; *Exp Homan*, L R. 12 Eq 598. See *Exp Harding*, L. R. 15 Eq 223.

owner, and the mortgagee cannot, until the term or interest of the mortgagor is determined, bring trover (*k*); and if the mortgagee seizes the chattels without due notice of payment, the mortgagor can bring trespass against him (*l*). But under a proviso or term of this kind, the mortgagor has been held not to be the "true owner" within the reputed ownership clause, on the ground that such interest of the bankrupt was really illusory, and substantially, if not technically, permissive; that the law will not allow a mortgagor of chattels to stay in possession and so evade the rule; and that where the mortgagee can enter into possession by giving a short notice, or (as it was put by Mr. Justice Willes) where the mortgagee consents to put himself in a position in which he has no immediate right to the possession of the goods, they are, in reality, in the possession of the mortgagor with the consent of the true owner (*m*). So far as his general creditors are concerned, the mortgagor in such a case has the reputation of absolute ownership, though, as between himself and the mortgagee, he has a real, though limited, interest. Of course where the mortgagor has not even such interest, but merely a licence to use the chattels mortgaged, the reputed ownership clause clearly applies (*n*).

When the mortgagee contracted to sell at the date of the bankruptcy, the possession of the mortgagor brought the case within the clause (*o*).

Materials which an owner of land may seize under a builder's contract are not in the order and disposition of the builder with the consent of the true owner, for, until seizure, the landowner is not the true owner of the goods, and, independently of the Bills of Sale Acts, the right of the trustee in the builder's bankruptcy would be subject to the right to seize under the building agreement (*p*). But such a power, unless carefully framed, may bring the contract within the mischief of those Acts (*q*).

There must be consent of the creditor; and therefore where A. gave B., his creditor, a delivery order for goods lying at a railway station, and B., on presenting his order within a reason-

Consent of true owner.

(*k*) *Fenn v Bittlestone*, 7 Exch 152.

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(*l*) *Brierley v Kendall*, 17 Q B 937

(*o*) *Barnes v Pinkney*, 36 L. J Ch. 815

(*m*) *Spackman v Miller*, 12 C B. N S. 659

(*p*) *Exp Newitt, Re Garrud*, 16 Ch. D. 622, C A.

(*n*) *Freshney v Carrack*, 1 H & N. 653, *Hornsby v. Miller*, 1 E & E.

(*q*) *Clumpson v Coles*, 23 Q B. D 465, *post*, p. 199.

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Withdrawal
of consent.

able time, found that the goods had been removed in the meantime to A's manufactory, and A. shortly afterwards became bankrupt, it was held that B had a valid lien (i)

If the consent is withdrawn before the bankruptcy, although possession is not actually taken, the clause does not apply. Instructions to take possession of the whole, followed by actual possession of part, is a sufficient withdrawal of consent (s), and also sending a broker to take possession, although he could not get into the house (t); and where a demand of possession is made by the creditor to the person in possession of the goods without notice of an act of bankruptcy, the clause does not apply (u); after such demand the possession cannot be without the consent of the true owner (u).

Where there was an equitable assignment of goods without possession, the intention being that the debtor should sell the goods for the creditor, a formal demand of the goods by the creditor, after the filing of a petition for liquidation, but before any meeting, took the case out of the statute (x).

Entry of
creditor before
bankruptcy
of debtor

Entry and sale before the bankruptcy take the case out of the statute (y); and possession taken of stock in business is sufficient to carry furniture in the house (z)

Where possession is taken between the presentation of a liquidation petition and the order, the goods are protected (a).

Attempts by the creditor to obtain possession before the bankruptcy, the creditor being excluded, are sufficient (b); but an intention not acted on will not do (c). Where the assignee put a man in possession, but the assignor continued to live on the premises, there was not sufficient possession (d). The sheriff's wrongful possession is still the possession of the mortgagor (e); *secus*, if the goods are rightfully in hands of the sheriff (f)

The true owner taking back the goods without notice of an act of bankruptcy takes the case out of the statute (g).

(i) *Exp Bell*, 17 L. J Bky 9.

(s) *Re Estick*, 4 Ch D 496

(t) *Exp Harris*, *Re Pulling*, L R 8 Ch A 48

(u) *Smith v Topping*, 5 B & Ad 674, *Exp Ward*, L R 8 Ch A 148, *Exp Pritchard*, Fonb Bky 238

(x) *Exp. Montagu*, 1 Ch D. 554, C A.

(y) *Graham v Webb*, 3 F & F. 239.

(z) *Re Estick*, 4 Ch D 496.

(a) *Re Wright*, *Exp. Arnold*, 3 Ch.

D 70, C A.

(b) *Exp Harris*, L R 8 Ch A 48

(c) *Drewin v Short*, 1 Jur N. S. 798, Q B

(d) *Exp Hooman*, L R 10 Eq 63, *Exp McLean*, 24 L T N S 144

(e) *Exp Edey*, L R 19 Eq 264

(f) *Re Balduin*, 2 De G & J 230, But see *Exp Lamb*, 14 W R 112, *Bky And Barrow v Bell*, 2 Jur. N S. 159

(g) *Graham v Furber*, 14 C. B. 134.

And an injunction can be obtained by the true owner (*h*)

In order to exclude the operation of the reputed ownership clause, it is sufficient if a mortgagee takes real possession of the mortgaged goods with the intention of asserting his rights, even though such possession is friendly and without depriving the mortgagor of the user of the goods (*i*).

The last condition necessary under the section to cause goods not belonging to a bankrupt to pass to his trustee is, that they should be in the possession, &c. of the bankrupt "under such circumstances that he is the reputed owner thereof" Whether there is a reputed ownership with the consent of the true owner, such as to bring goods within the section, is a matter of fact to be determined on the evidence in the particular case (*h*)

Meaning of
"reputed
ownership"

Upon the same principle of reputed ownership, where an undischarged bankrupt is allowed by his trustee to trade, the assets, upon a second bankruptcy, belong to the assignees under the latter (*i*). There must, however, be knowledge and consent on the part of the trustee (*m*); mere *laches*, not amounting to fraud, will not do. It is no part of the duty of the trustee or creditors to look after the debtor (*n*)

Securities given to the subsequent creditors of such bankrupt with or without notice of the bankruptcy are binding upon the trustee (*o*)

The doctrine of reputed ownership has here been considered only with reference to its bearing on the operation and efficacy of mortgages or bills of sale of chattels; the subject will be found more fully discussed in several treatises on bankruptcy law.

The question as to the efficacy of a duly made and registered bill of sale given by way of security as against the trustee in bankruptcy of the grantor will be considered in a subsequent section of this Chapter (*p*).

Validity of
bill of sale as
against
trustee

(*h*) *Mather v Lay*, 2 J & H. 374.

(*i*) *Exp National Guardian Assurance Co, Re Francis*, 10 Ch D. 408, C A

(*k*) *Horn v Baker*, 9 East, 215, 2 Sm L C 255 (9th ed), *Price v. Groom*, 17 L J Ex 346, *Edwards v. Scott*, 1 Man & Gr 962, *Hamilton v. Bell*, 10 Exch 545, *Watson v. Peach*, 1 Bing N C 327, *Whitfield v. Brand*, 16 M & W 252, *Priestley v. Pratt*, L R 2 Ex 101, *Re Rawbone's Trusts*, 26 L J Ch 588, *Ex parte Watkins*, *Re Couston*, L R 8 Ch A. 520.

(*l*) *Troughton v Gitley*, Amb 630, *Exp Ford*, 1 Ch D 521, C A, *Kenakoose v Brooks*, 8 Mo I A 339, *Engelbach v Nixon*, L. R. 10 C P 645, *Meggy v Imperial Discount Co*, 3 Q B D 711

(*m*) *Re Clarke, Ex parte Bearmore*, (1894) 2 Q B 393.

(*n*) *Exp Ford, sup*, qualifying *Re Rawbone's Trusts*, 26 L J Ch 588

(*o*) *Re Casneau's Legacy*, 2 K & J. 249, *Cohen v Mitchell*, 25 Q B D 262, C A.

(*p*) *Post*, pp. 189 *et seq*

CHAPTER XIV.

v.—Rights of Mortgagor and Mortgagee of Chattels —Independently of the Bills of Sale Acts, the following points have been decided as to the rights of parties under mortgages of goods and chattels —

Insurance

A mortgagee of chattels personal, which have been insured by the mortgagor and been destroyed by fire, cannot, on action brought to restrain the payment of the insurance moneys to the mortgagor, &c, obtain an order for payment of money into Court, without serving the trustees in bankruptcy of the mortgagor with notice (*q*)

Trover for mortgaged chattels

Where goods and chattels are assigned by way of mortgage, the mortgagor having the right to possession of the mortgaged chattels can alone maintain trover for the goods until default, when the estate of the mortgagee, being freed from the condition, becomes absolute, so that he can maintain trover for the goods (*r*).

If the goods are in the meanwhile taken by a third person, as an execution creditor, the mortgagee is then unable to require possession (*s*)

Right to possession.

The right of the mortgagee to possession is not affected by his having received a bill of exchange on account of the debt, and indorsed it over for value (*t*)

But if the mortgagor in possession under the proviso until default sells the goods, this act determines his possession, and the mortgagee can recover at once against the purchaser (*u*).

Where the mortgagor had, before the mortgage, bailed the goods, the mortgagee can recover them from the bailee (*v*).

The effect of these statutes is, that although a mortgage of chattels personal made *bonâ fide* and for a valuable consideration, but the possession of which is retained by the assignor, will be valid against creditors at common law, and under 13 Eliz c 5, if it can be shown that the possession is consistent with the nature of the transaction, so that the presumption of fraud raised by the possession is rebutted, yet it may be void under the statutes of bankruptcy, as against the trustees of a bankrupt,

(*q*) *Marrage v Royal Exchange Assurance Co*, 18 L J Ch 216. *Nota*, the mortgagee was also equitable mortgagee of leasehold premises on which the chattels were.

(*r*) *Bradley v Copley*, 1 C. B. 685

(*s*) *Wheeler v. Montefiore*, 2 Q. B. 133. See *White v. Morris*, 11 C. B.

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(*t*) *Bramwell v. Eglinton*, 5 B & S. 39

(*u*) *Loeschman v Machin*, 2 Stark. 311, *Cooper v Willomatt*, 1 C B 672, *Payne v Fern*, 6 Q. B. D. 620.

(*v*) *European, &c Co v. Royal Mail, &c. Co*, 8 Jur N S 136, Q B

who continues the reputed owner, unless it can be shown that possession has been given as far as circumstances would permit.

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SECTION II.

OF THE BILLS OF SALE ACTS.

i—Introductory remarks—Mortgage deeds of chattels are now generally governed by the Bills of Sale Acts, 1878 (*w*) and 1882 (*x*). The objects of these Acts have been (1) to protect creditors, to give them a true idea of their debtor's position, and to prevent clandestine transactions by which the grantor is allowed to retain the possession of property which the grantee may at any moment withdraw from the claims of creditors, and dispose of as he thinks fit (*y*); and (2) to protect persons whose necessities compel them to give bills of sale on their goods as security for debts or advances, from being induced or compelled by their creditors to enter into stipulations of the effect of which such debtors may be ignorant, or which, if knowingly entered into, might place a helpless grantor at the mercy of a rapacious grantee. How far the latter object of the Legislature is sound in policy, or has hitherto been satisfactorily effectuated, it would not be pertinent to the scope of this treatise to discuss, but it may, perhaps, be permissible to remark that one undeniable result of the Acts has been to produce a vast amount of expensive litigation, and of decisions not always easily reconcilable on any consistent ground of principle or with each other (*z*).

Policy of the
Bills of Sale
Acts

In 1854, for the better protection of purchasers and mortgagees, the Bills of Sale Act of that year (*a*) was passed, which by sect 1 thereof provided that every bill of sale of personal chattels, whether absolute or conditional, should be void as against assignees, creditors, &c., of the grantor, unless the same or a copy thereof should be filed within twenty-one days in manner therein prescribed; the bill was to be accompanied by an affidavit which was to be filed simultaneously with the bill (*a*). This Act was amended by the Bills of Sale Act, 1866 (*b*).

Bills of Sale
Acts, 1854
and 1866

(*w*) 41 & 42 Vict. c. 31.

(*x*) 45 & 46 Vict. c. 43

(*y*) See Reed on the Bills of Sale Acts (9th ed.), p. 30, Lyon & Redman, Law of Bills of Sale, 1, 2. See also *Exp Spanrow*, 2 DeG. M. & G. 907

(*z*) See *Exp Collins, Re Yarrow*, 38 W. R. 175

(*a*) 17 & 18 Vict. c. 36. See *Grindell v Brendon*, 6 C. B. N. S. 698, *Mason v Wood*, 1 C. P. D. 67

(*b*) 29 & 30 Vict. c. 96.

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Bills of Sale
Act, 1878

Both these Acts were repealed (except as regards existing bills of sale) by the Bills of Sale Act, 1878 (*c*), which was made applicable to every bill of sale executed on and after the 1st of January, 1879

The language of the Act of 1878 is, in many respects, identical with the repealed Act of 1854; and accordingly the cases decided under the earlier Act are, for the most part, applicable under the Act of 1878. Attention will be called to the material alterations effected by the Act of 1878 as its provisions come under notice

Bills of Sale
Act, 1882

In 1882, the Bills of Sale Act (1878) Amendment Act 1882 (*d*), was passed, and is to be construed as one with the Act of 1878, but does not apply to any bill of sale duly registered before the commencement of the Act of 1882, so long as the registration thereof is not avoided by non-renewal or otherwise. This Act (which is here cited as the Bills of Sale, Act, 1882, or as the Act of 1882) applies only to bills of sale given by way of security for payment of money (*e*).

Bills of Sale
Acts, 1890
and 1891

Two further amending Acts have been since passed, namely, the Bills of Sale Act, 1890 (*f*), which excepts letters of hypothecation of imported goods from the operation of s 9 of the Act of 1882, and the Bills of Sale Act, 1891 (*g*), which altogether exempts from the operation of the Acts of 1878 and 1882 certain securities on imported goods

Application
of Acts.

The English Acts do not apply to Ireland or Scotland (*h*).

ii.—What Instruments are “Bills of Sale” within the Acts—
The expression “bill of sale” is thus defined in sect 4 of the Act of 1878:—

Interpreta-
tion of term
“bill of sale”

“The expression ‘bill of sale’ shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred.”

(*c*) 41 & 42 Vict. c. 31, s. 23.

(*d*) 45 & 46 Vict. c. 43.

(*e*) *Ibid* s. 3

(*f*) 53 & 54 Vict. c. 53.

(*g*) 54 & 55 Vict. c. 35.

(*h*) Act of 1878, s. 24, Act of 1882, s. 18. The Irish Acts are 42 & 43 Vict. c. 50, and 46 Vict. c. 7

By sect. 3 of the Act of 1882, the expression "bill of sale" has the same meaning as in the Act of 1878, except as to bills of sale, or other documents mentioned in sect 4 thereof, given otherwise than by way of security for the payment of money to which the Act of 1882 does not apply

This definition is only for the purposes of the Bills of Sale Acts (*i*); and, so far as relates to all absolute bills of sale, and also to bills of sale by way of security for money, made or given before the commencement of the Act of 1882 (*k*), the definition must be read in connection with sect 3 of the Act of 1878, which provides that such Act shall apply to all bills of sale "whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale" (*l*). The effect of this enactment would appear to be to exclude any mortgages of chattels, made or given before the commencement of the Act of 1882, and now subsisting by virtue of renewals (*m*), where possession of the goods is delivered prior to or contemporaneously with the execution of the mortgage deed, from the operation of the Act of 1878, by which alone such bills are regulated.

But as regards instruments falling within the definition of sect 4 of the Act of 1878, and made or given by way of security for money on or after the 1st November, 1882, a question arises which, though perhaps not likely to be of frequent occurrence, is nevertheless of some importance, namely, whether delivery of the goods anterior to, or contemporaneous with, the execution of the instrument, will exclude the operation of the Acts.

It has repeatedly been held (*n*) that where goods are pledged or deposited by way of security for money, an instrument in writing accompanying the pledge or deposit and merely regulating the rights of parties with regard to the possession of the goods, but neither giving any authority to take such possession, nor transferring any property therein, are not within the mischief of either the Act of 1878 or the Act of 1882. But there appears to be no reported decision on the point whether a mortgage of chattels already delivered purporting to transfer the

(*i*) See *Meux v Jacobs*, L. R. 7 H. L.

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(*k*) 1st November, 1882.

(*l*) See *Re Hall, Exp. Olose*, 14 Q. B. D. 386, 392

(*m*) See *post*, p. 249.

(*n*) See *inf.* p. 202.

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property therein, and so to convert what otherwise might be merely a pledge or deposit into a legal mortgage conferring a right to foreclosure, falls within the operation of the Acts so as to require to be registered, and to be void unless made in conformity with the statutable form prescribed by the Act of 1882, which is obviously not applicable to transactions of this nature.

In one of the cases (o) above referred to, in which it was decided that a memorandum accompanying a pledge was not within the Act of 1882, Sir C. Bowen, L J, said he considered it clear that a document of this kind, which is not intended to transfer the property in goods, or to give any right to possession of them, is not within either of the Bills of Sale Acts, and is not struck at by either of them; and he pointed out, with reference to the question then before the Court, it was not necessary to determine what was the bearing of sect 3 of the Act of 1878 or sect 4 of the same Act, and that if it were, he could wish to take further time for consideration (p). But Sir E Fry, L J, in the same case, said that it appeared to him that the effect of sect. 9 of the Act of 1882 is to make void every document which is included in sect 4 of the Act of 1878 which does not in substance comply with the statutory form; and he stated his then present impression to be that sect 4 is not modified by sect 3 (q). In a recent case (r), Sir R Vaughan Williams, J, in deciding a question as to the validity, as against the liquidator of certain debentures issued by a friendly society, gave a brief statement of the history of the Bills of Sale Acts, in the course of which his lordship observed:—"The Bills of Sale Act, 1878, Amendment Act, 1882, has a very much wider scope than either of the previous Acts. It is intended not only for the prevention of frauds upon creditors, but also for the protection of debtors and those who are in need against those who are apt to take advantage of their necessities to prey upon them, and to defraud them; and thus being so, it is a natural consequence that one should find that the Act of 1882 applies not only—as the Acts of 1854 and 1878 did—to a case where the grantor remained in possession of the property notwithstanding the bill of sale, but also in the case of bills of sale, grants, or charges, which are

(o) *Exp Hubbard, Re Hardwicke*, 17 Q. B. D 690, C A.

(p) *Ibid* at p 699.

(q) *Ibid*. at p 701.

(r) *Great Northern Rail. Co. v Coal Co-operative Soc.*, (1896) 1 Ch. 187 at pp 192, 193

given either absolutely (s) or as security for debts or advances, and to cases where the grantee may be in actual possession."

The question under consideration accordingly depends upon whether sect 3 of the Act of 1878, which admittedly limits and controls the definition given by sect 4 in cases falling only within that Act, also limits and controls such definition in cases falling under the Act of 1882. On this point, though there is no express decision, it is apparently to be inferred from the dicta above referred to, that, if the question were to come before the Courts, it would be so decided as to declare that any mortgage made after, or contemporaneously with, delivery of the chattels comprised therein, would be void as regards such chattels, as being incapable of being made according to the statutable form.

Mortgages of, or charges on chattels may, however, be effected without deed or other writing, and the conditions under which the goods are delivered or retained may be proved by parol evidence (t). A mortgage of chattels unaccompanied by any writing, but completed by actual delivery, will not be affected by the Bills of Sale Acts (u), but will be valid not only as against execution creditors, but also as against the trustee in bankruptcy of the mortgagor, unless the latter has, previously to the delivery, committed an act of bankruptcy upon which subsequent proceedings in bankruptcy are founded.

Parol mortgage of chattels

The Acts relate only to documents, and not to transactions which may be effected without any writing (x). And, accordingly, a parol charge, without delivery of possession to the lender, would be valid at common law, if made in good faith, but the retention of possession by the borrower would be a strong presumption of an attempt to defraud creditors, and the goods would, of course, be in the order and disposition of the borrower so as to pass to his trustee in bankruptcy.

The meaning of the several expressions used in the above definition of a bill of sale will be now considered.

Meaning of expressions used in the definition

A "bill of sale," for the purposes of these Acts, has been defined as an instrument "on which the title of the transferee

"Bill of sale"

(s) Bills of sale given absolutely are expressly excluded from the operation of the Act of 1882. See sect. 3 of that Act, *ante*, p. 191.

(t) *Lit s* 365, *Reeves v Capper*, 5 Bing N C 136, *Flory v. Denny*, 7 Exch 581.

(u) *Woodgate v. Godfrey*, 5 Ex D. 24, C. A.

(x) *Woodgate v. Godfrey*, *sup*. See *North Central Wagon Co v Manchester, Sheffield, and Lincolnshire Rail Co*, 35 Ch D at p. 203, affirmed, 13 App. Cas 554.

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“Assignments and transfers”

“Declarations of trust”

depends, either as an actual transfer of the property, or an agreement to transfer, or as a muniment or document of title taken at the time as a record of the transaction” (y).

The words “assignment” and “transfer” seem equally to mean a document, which, though not in form a bill of sale, assumes to transfer the property in goods in the same way in which a bill of sale would do so (z). These expressions do not include assignments and transfers of existing bills of sale (a).

Declarations of trusts of chattels may be made by parol (b), but if the terms of the trust are reduced to writing without delivery of the goods, the instrument will be a bill of sale within the meaning of the Acts; and, therefore, if the trusts are by way of security for money, the instrument will be void as being incapable of being framed in accordance with the statutory form prescribed by the Act of 1882 (c), unless the document is not intended to operate, and does not operate, until the goods are actually delivered (d).

Where a letter purporting to transfer coals on a debtor’s wharf, and undertaking to hand over the proceeds thereof to the creditor, was duly registered as a bill of sale under the Act of 1854, it was held that this was a valid declaration of trusts of the proceeds within the meaning of that Act, and that the title of the creditor on taking possession of the goods prevailed against the trustee in the debtor’s liquidation (e).

So also a hypothecation note, given on an advance by bankers, undertaking to hold goods for the bankers and to hand to them, out of the proceeds thereof, the amount of the loan, was held to be a declaration of trust without transfer, and, consequently, a bill of sale within the meaning of the same Act (f).

“Receipt” and “inventory”

Under the Act of 1854, it was held that the bill of sale, whatever its form, must be an instrument by which a title to the goods is acquired; the term, therefore, did not include a receipt for purchase-money, though it referred to an inventory of the goods (g).

(y) *Mansden v Meadows*, 7 Q B D 80, C A. See *Horsfall v Key*, 2 Exch R 778, *Manchester, Sheffield, and Lincolnshire Rail Co v North Central Wagon Co*, 13 App Cas 554.

(z) *Per* Lord Esher, M R, in *Exp Hubbard, Re Hardwick*, 17 Q B D 690, C A. See *Re Roberts, Evans v Roberts*, 36 Ch D. 196 (entry in auctioneer’s book).

(a) See Act of 1878, s. 10 (3).

(b) *Pechham v Taylor*, 31 Beav 254.

(c) See sect 9 of that Act and schedule.

(d) *Charlesworth v Mills*, (1892) A C 231.

(e) *Exp Montagu, Re O’Brien*, 1 Ch D 554, C A.

(f) *Reg v Townshend*, 15 Cox, C C. 466.

(g) *Allsopp v Day*, 7 H & N 457, *Thomson v. Barrett*, 1 L. T. N S 268,

As regards absolute assignments, the rule has been laid down that, under the Act of 1878, if a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, even if the document be only a simple receipt for the purchase-money, it will be a bill of sale; but not so if the bargain is complete without the document so that the property passes independently of it (*h*), or, in other words, the document, in order to fall within the mischief of the Acts, must amount to an assurance of personal chattels at law or in equity (*i*).

The earlier decisions referred to were held not to be applicable where the transaction was really a security (*h*); and, if it appear that this is the true nature of the transaction, it is clear that, under the present Acts, an inventory or receipt given in connection therewith is a document by virtue of which alone the property in the goods passes to the mortgagee, and is, consequently, a "bill of sale" within the definition, and being a bill of sale by way of security, it will be void as not being in accordance with the statutable form.

If an inventory and receipt for the money are given by separate documents operating independently, the inventory will not be a bill of sale, there being no inventory with receipt attached within the meaning of sect 4 of the Act of 1878 (*l*). But, of course, such independent receipt, if the mortgagee's title to the property depends thereon, will be a bill of sale, and void accordingly.

Where goods were actually delivered as security for an advance, together with a receipt for the sum advanced signed by the borrower, it was held that the receipt, not being an assurance, was not a bill of sale (*m*).

A receipt with an inventory given by a sheriff's officer was held not to be a bill of sale under this section, though the pur-

Hale v Metropolitan Saloon, &c Co, 28 L J Ch 777, *Gough v Everard*, 2 H. & C 1, *Woodgate v Godfrey*, 4 Ex D. 59, 5 Ex D 24

(*h*) *Ramsay v Margrett*, (1894) 2 Q B 18, 23, C A

(*i*) *Marsden v Meadows*, 7 Q B D 80, C A. See *North Central Wagon Co v Manchester, Sheffield, and Lincolnshire Rail Co*, 35 Ch D 191,

affirmed in D. P 13 App Cas 554

(*h*) *Exp. Odell, Re Walden*, 10 Ch D. 76, C A

(*l*) *Per Lord Herschell in Manchester, Sheffield, and Lincolnshire Rail Co. v North Central Wagon Co*, 13 App Cas at p 561.

(*m*) *Newlove v. Shrewsbury*, 21 Q B D 41, C A. See *Shepherd v. Fulbrook*, 59 L T 288, C A.

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"Other
assurances"

chaser allows the debtor to remain in possession (*n*) But the question must be determined on the facts of each case (*o*)

The words, "other assurances of personal chattels," occur in the Act of 1854 as well as in the Act of 1878, and are doubtless intended to include all documents of a like nature with, but not strictly falling within the description of the several instruments mentioned before, but the words seem also to emphasize the rule that all documents, whatever their form, which pass the title to goods by way of assurance, are bills of sale within the meaning of the Acts (*p*)

If, however, the actual possession of chattels is delivered at the time of the advance, so that the legal possession passes immediately to the grantor, a contemporaneous agreement in writing, merely regulating the rights of parties in regard to the transaction, is not an assurance, nor in any other respect a bill of sale within the meaning of the Acts, and does not require registration (*q*).

Questions arose under the Act of 1854 as to whether agreements to execute future bills of sale came under the category of "other assurances" as being equitable assignments of goods; but such agreements are now expressly included in the definition of a bill of sale by the concluding words of sect. 4 of the Act of 1878 (*r*).

An agreement providing for the payment of the purchase-money of a business, with interest at a future time, and declaring that, until payment, the vendors should have a lien on the business and effects sold, was held to be an "assurance" within the meaning of the Bills of Sale Acts (*s*). So, also, a memorandum of sale of goods entered in an auctioneer's book by his clerk, and signed by the auctioneer on behalf of the purchaser, but otherwise not complying with the requirements of sect. 17 of the Statute of Frauds (*t*), was held to be an assurance of chattels, and consequently void as a bill of sale (*u*)

Hiring
agreements.

Hiring agreements are not bills of sale within the meaning of the Acts of 1878 and 1882, so as to require registration as bills

(*n*) *Marsden v Meadows*, 7 Q. B. D. 80, C. A., see *Haydon v Brown*, W. N. (1888) 149, C. A.; *Jones v Tower Furnishing Co* 61 L. T. 84

(*o*) *Re Hood, Exp Blandford*, 42 W. R. 23, C. A.

(*p*) See *ante*, p. 190

(*q*) *Charlesworth v Mills*, (1892) A. C. 231. See *Exp. Hubbard, Re*

Hardwicke, 17 Q. B. D. 690, C. A., *Hilton v Tucker*, 39 Ch. D. 669, *Grigg v National Guardian Assurance Co*, (1891) 3 Ch. 206

(*r*) *Ante*, p. 190.

(*s*) *Coburn v Collins*, 35 Ch. D. 373.

(*t*) 29 Car. II. c. 3

(*u*) *Evans v Roberts*, 36 Ch. D. 196.

of sale, provided that they are properly framed, so that no right of property at law or in equity passes to the hirer until payment of the last instalment, even though the effect of such an instrument may, to some extent, give the owner of the goods a security for the regular payment of instalments by the hirer (x); but if it appear from the terms and substance of the instrument, taken as a whole, that it was the real intention and main purpose of the parties immediately to pass the property in the goods to the hirer, and to create a security on the goods for payment of the price by instalments covering interest, under the colourable pretence of a hiring agreement, then the instrument will be vitiated as a hiring agreement, and will come within the mischief of the Bills of Sale Acts (y).

It has been held in several cases that the Court might in such cases disregard the form and terms of the instrument, and look to the circumstances of the particular transaction as a whole as tending to show that the real intention of the parties was to give to the vendor a security or lien for the purchase-money (z). It would seem, however, that these decisions are not to be relied upon in any case where the instrument is precise in its terms and clearly defines the rights and obligations of the parties as on the footing of a hiring agreement. In a recent case, before the House of Lords, where it was argued that the circumstances of the transaction showed it to be not one of hiring, but of sale and mortgage by the purchaser, Lord Herschell, after conceding that the agreement must be regarded as a whole, and that its substance must be looked at, laid down the rule that "there is no such thing as looking at the substance apart from looking at the language which the parties have used" (a).

The question, therefore, is one of construction of the particular instrument in each case. It would seem, however, that if the terms of an instrument purporting to be a hiring agreement are equivocal, the Court is at liberty to look at the surrounding circumstances of the particular case, so as to arrive at a true construction of the instrument and to ascertain the real intention of the parties. So it is conceived that, notwithstanding the

(x) *Exp Craucoun, Re Robertson*, 9 Ch D 419, C A, *Exp. Emerson, Re Hawkins*, 20 W R. 110. See *Re Davis & Co, Exp Rawlings*, 22 Q B D 193, *McEntire v Crossley Brothers*, (1895) A C 457.

(y) *Madell v Thomas*, (1891) 1 Q B 230, C A.

(z) *Re Watson, Exp Official Receiver*, 25 Q B D 27, C A, *Madell v. Thomas, supra*, *Beckett v Tower Assets Co*, (1891) 1 Q B 638, C A.

(a) *McEntire v Crossley Brothers*, (1895) A C 457, at p 463. See *United Forty Pound Loan Club v Beeton*, (1891) 1 Q B. 28, n.

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recent decision of the House of Lords above referred to, the Court may, in accordance with the general rule as to the admissibility of parol evidence to explain a written contract (*b*), take into account the fact that the vendor has parted with the possession of his goods in the usual course of his particular trade, under what is known as the hire and purchase system (*c*); but if a private person, or a trader not in the ordinary course of his business, purports to sell the goods to another person and retains possession thereof, under an agreement whereby the purchaser purports to hire them to the vendor, the transaction is obviously open to suspicion, and, unless the terms of the instrument clearly show a contrary intention, the presumption will arise that its intention and effect is to create a security for a loan under the pretence of a hiring agreement, so as to render the instrument void under the Bills of Sale Act, 1882 (*d*), but the presumption may be rebutted (*e*).

Inventory accompanying hiring agreement.

An inventory and receipt given together with a hiring agreement for the purpose of securing the money payable under the agreement is apparently within the mischief of the Acts (*f*).

Severability of subject-matter.

Where the owner of a piano assigned by way of security for a loan the piano itself, and also the benefit of an agreement for hire and purchase of the same, it was held that the assignment was severable, and that though the deed was not in the statutory form nor registered it was valid as an assignment of the rights under the agreement (*g*).

Powers of attorney.

The inclusion of "powers of attorney" in the definition of a bill of sale is intended to prevent instruments operating really as bills of sale from being framed in the form of powers of attorney, in order to evade the provisions of the Acts and escape the necessity of registration. It is clear that such instruments, if given by way of security for money, will be void as not being according to the statutable form, and there do not appear to be any reported decisions with regard to such documents.

Licences to seize.

Authorities or licences to seize chattels, if given on or after the 1st November, 1882, will be void for the same reason.

Under the words "licence to take possession of chattels," a brewer's lease, with power to take possession of stock in trade on non-payment of account current, is within the Act (*h*). A

(*b*) See *Myers v Sari*, 3 E & E 306

(*c*) *Exp. Craucour, Re Robertson*, 9 Ch D. 419, C A. See also *Re Davis, Exp Rawlings*, 22 Q B D 193, C A.

(*d*) *Exp. Odell, Re Walden*, 10 Ch. D. 76, *Beckett v Tower Assets Co*, (1891) 1 Q. B. 638, C A.

(*e*) *Exp Collins, Re Yarrow*, 59 L. J. Q B. 18.

(*f*) *French v Bombardier*, 60 L. T.

49 See *Jones v Tower Furnishing Co*, 61 L. T. 84

(*g*) *Re Isaacson, Exp Mason*, (1895) 1 Q. B. 333, C A.

(*h*) *Exp Hopcraft, Re Flavell*, 14 W R 168 See *Pulbrook v. Ashby*, 56 L J Q B. 376, *Stevens v. Marston*, W. N (1890) 193.

licence in a builder's contract to take possession on default, "as and for liquidated damages," is not within the words of the Act, "as security for any debt" (i); nor an agreement that all building and other materials brought by the builder upon the land shall become the property of the landowner (j)

But where a lessee assigned certain houses in the course of erection, and also all bricks and other building materials which might at any time thereafter be brought by or for the mortgagor into the premises for completing the buildings, it was held that the deed was void for want of registration as a bill of sale in respect of the personal chattels comprised therein (k)

A power in a mining lease for the lessor to distrain for rent on "adjoining" mines of the lessees is not within the mischief of the Acts (ll).

As regards bills of sale made before the 1st November, 1882, a distinction has been taken between an assignment of future chattels and a mere power at any time to enter and seize them (l)

If there is a mere licence to seize, and no interest in, the future chattels, the licence cannot be exercised to the prejudice of any person who has obtained an interest in the chattels in the interval before seizure (m); but if such licence is *bonâ fide* exercised after, but without notice of, an act of bankruptcy and before adjudication, the seizure is a protected transaction under the bankrupt law (n).

Even under the Bills of Sale Act, 1854, an agreement for a bill of sale, if relied on as an equitable assignment of goods, required registration as a bill of sale under that Act (o). So, also, a memorandum in writing whereby debtors undertook to hold their stock in trade, present and future, at the disposal of a creditor and, whenever required by him so to do, to execute a valid transfer and assignment to him as a security for the debt (p)

A parol agreement to give a bill of sale is, of course, incapable of registration, and is not within sect 4 of the Act of 1878 (q)

Agreements
to give bills
of sale

(i) *Exp Newitt, Re Garrud*, 16 Ch D 522, C A

(j) *Blake v Izard*, 16 W R 108, *Brown v Bateman*, L R 2 C P 272, *Exp Newitt, supra*, *Reeves v Barlow*, 12 Q B D 436, C A

(k) *Olimpson v Coles*, 23 Q B D 465 See *Church v Sage*, 67 L T 800

(ll) *Re Roundwood Coll Co, Lee v Roundwood Coll Co*, (1897) 1 Ch 373, C A

(l) *Carr v. Allatt*, 27 L J Exch 385, *Reeve v. Whitmore*, 33 L J Ch.

63, *Brown v Bateman*, L R 2 C P 272, 284

(m) *Re Waugh*, 4 Ch D 527

(n) *Exp Newitt*, 16 Ch D 522, C A

(o) *Exp Mackay, Re Jeavons*, L R 8 Ch A 643

(p) *Exp Conning, Re Steele*, L R 16 Eq 414 See *Exp Montague, Re O'Brien*, 1 Ch D 554, C A, *Baghott v Norman*, 41 L T 787

(q) *Exp Hauxwell, Re Hemingway*, 23 Ch. D 626, C A

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Such an agreement is enforceable if the money has passed (r) ; but it will not prevail against the claims of creditors in the event of the borrower's bankruptcy or liquidation, or against a creditor who has levied execution ; a formal bill of sale duly registered is necessary for that purpose (s). It would also seem that, if a written agreement is followed, immediately on the advance being made, and completion of the security, by a formal bill of sale pursuant to the agreement, such an agreement may be referred to as evidence of the good faith of the transaction, though not registered, nor in the statutable form (t).

In such a case, the agreement, though in writing, is not itself relied upon as giving any equitable right to a security, inasmuch as it is not enforceable in equity until the advance is actually made (u).

It would seem also that if a borrower agrees in writing to secure money advanced to him by a formal bill of sale, which is subsequently given accordingly, the fact that the agreement is not registered, nor according to the statutable form, will not affect the validity of the bill of sale, as it is conceived that the money will be deemed to have been advanced on the security of the bill, which will be treated as standing on the same footing as if it had been given at the time of the advance, according to the rule laid down in a case decided under the Act of 1854 (v).

But it is clear that, until a bill of sale has been given pursuant to an unregistered agreement in writing, the lender will have no security upon the goods for repayment of his money, as the instrument on which he relies as conferring on him a right in equity to a security will be a bill of sale within the meaning of the Acts, and therefore void (x).

It has been held that the expression, in sect 4 of the Act of 1878, "any agreement by which a right in equity to any personal chattels or to any charge or security thereon shall be secured," is to be strictly construed, and accordingly that the expression does not include documents which do not confer an equitable right, but a right at law only (y).

Agreement
securing right
in equity.

(r) See ante, p 50

(s) *Jarvis v Jarvis*, W N. (1893)

138 (t) *Exp Hauzwell, Re Hemingway*,
23 Ch D 626, C A.

(u) *Rogers v Challis*, 27 Beav 175
See ante, p. 48.

(v) *Harris v. Rickett*, 4 H & N 1.
See *Mercer v. Peterson*, L. R. 3 Ex.

104, *Exp King, Re King*, 2 Ch D.
256, C A.

(x) *Edwards v. Edwards*, 2 Ch. D.
291

(y) *Reeves v. Barlow*, 12 Q B D
436. *Exp Hubbard, Re Hardwick*, 17
Q B D 690, C A ; *Morris v. De-*
lobbel-Flype, (1892) 2 Ch 352.

So, where an owner of goods which had been seized under a *fi. fa.*, agreed verbally with the auctioneer that, in consideration of his paying out the sheriff, the auctioneer should hold the goods and sell them, and pay the surplus of the proceeds to the owner; the sheriff was paid out and the man in possession remained in possession on behalf of the auctioneer in accordance with the terms of the agreement, which were then reduced to writing; it was held that, inasmuch as the agreement was not intended to operate, and did not operate, till the possession had passed from the sheriff to the auctioneer, and as the agreement did not constitute the title of the latter, the document was not a bill of sale within the meaning of the Acts (z).

By sect 6 of the Act of 1878, it is enacted as follows:—

“Every attornment, instrument or agreement not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of the Act, of any personal chattels which may be seized or taken under such power of distress. Provided that nothing in that section shall extend to any mortgage of any estate or interest in any land, tenement or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant, at a fair and reasonable rent.”

Certain instruments giving powers of distress to be subject to this Act

The effect of this section in invalidating clauses of attornment by the mortgagor to the mortgagee, and powers of distress in mortgages of land, will be considered in a subsequent chapter (a).

Attornment clause

iii.—What Instruments are not “Bills of Sale” within the Acts—By sect 4 of the Act of 1878 (which in this respect is identical with sect 7 of the Act of 1854), it is enacted that the expression “bill of sale” shall not include the following documents:—

Exclusion of certain instruments from interpretation of term “bill of sale”

“Assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers’ certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorse-

(z) *Charlesworth v. Mills*, (1892) (a) *Post*, Chap. XXXVI, p. 663
A C 231.

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ment or delivery, the possessor of such document to transfer or receive goods thereby represented ”

Assignments
for creditors

Assignments for the benefit of creditors must, in order to fall within the exception, be for the benefit of all the creditors, though it need not be executed by all (*b*) An assignment for the benefit of all creditors who shall elect to execute the same is an assignment for the benefit of all (*c*) And a proviso that no creditor shall benefit who shall not assent to the deed within a fixed time will not prevent the deed from falling within the exception (*d*)

By the Deeds of Arrangement Act, 1887 (*e*), deeds of arrangement, as defined by that Act, for the benefit of creditors generally must be registered at the time and in manner thereby prescribed, or will be void.

Marriage
settlements

The exception in favour of “marriage settlements” extends to agreements for settlements made in contemplation of marriage, though informal and not under seal (*f*) ; but not post-nuptial settlements, unless made pursuant to such agreements (*g*)

Transfers or
assignments
of ships.

This exception extends to transfers, &c. of ships and vessels, of river barges, and all vessels beyond mere boats (*h*) ; of ships or vessels, though unfinished (*i*) ; of foreign ships (*k*) ; and of all articles and materials on board at the time of the mortgage, or brought on board subsequently in substitution therefor, which are necessary for the prosecution of the voyage (*l*).

Transfers in
the ordinary
course of
business

The Bills of Sale Acts do not apply to letters of hypothecation accompanying deposits of goods by merchants or factors, or to pawn-tickets, or to any case where the object and effect of the transaction are not to confer any right in equity, but only to regulate the legal right to possession of the grantee (*m*)

But it seems that a pledge by a trader of stock in trade, which

(*b*) *General Furnishing, &c Co v Fenn*, 2 H & C 153, *Johnson v. Osenon*, L R 4 Ex 108 See *Exp. Parsons, Re Townsend*, 16 Q B D 532, C A

(*c*) *Faine v Matthews*, 53 L T 872.
(*d*) *Hadley & Son v Beedon*, (1895) 1 Q B 646

(*e*) 50 & 51 Vict c 57.
(*f*) *Wenman v Lyon*, (1891) 2 Q B 192, C A

(*g*) *Fowler v. Foster*, 5 H. & C 99, *Ashion v. Blackshaw*, L R 9 Eq 518. See *Exp Cox, Re Reed*, 1 Ch D. 302.

(*h*) *Gapp v. Bond*, 19 Q B. D. 200,

C A

(*i*) *Exp Hodgkin (or Winter), Re Softley*, L R 20 Eq 746

(*k*) *Union Bank v Leuanton*, 3 C P D 243, C A

(*l*) *Coltman v Chamberlain*, 25 Q B. D 328

(*m*) *Exp Close, Re Hall*, 14 Q B. D. 356 See *Reeves v Barlow*, 12 Q B D 436, C A, *Exp Parsons, Re Townsend*, 16 Q B D 532, *Exp Hubbard, Re Hardwick*, 17 Q B D 690, 695, 700, C A, *Re Cunningham & Co, Attenborough's Case*, 28 Ch D 682, *Morris v. Delobel-Flipo*, (1892) 2 Ch 352.

he has bought and not paid for, is not a transfer in the ordinary course of business within the exception (*n*).

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An undertaking by merchants to hold goods at the disposal of brokers who had supplied goods on credit, and when required to execute a formal transfer, was held to require registration as a bill of sale (*o*).

The exception of bills of sale of goods in foreign parts extends to bills of sale of goods in Ireland or Scotland (*p*). But a bill, registered in England, of goods, some of which were in Ireland, was held to protect the goods against an execution levied in Ireland by a creditor who had obtained an English judgment (*q*).

Bills of sale
of goods
abroad

Where a borrower gave a promissory note for the loan, and at the same time signed and gave to the lender a memorandum agreeing to pay interest on the amount advanced, and also gave an order to a warehouseman to deliver to the lender certain warehoused furniture and effects of the borrower, it was held that the delivery order was not a bill of sale (*r*).

Delivery
order

An action for damages will not lie by reason of the registration, without malice, of a document which was not, in fact, a bill of sale requiring registration (*s*).

Wrongful
registration

iv.—What Things are “Personal Chattels” within the Acts.— Sect. 4 of the Act of 1878 enacts as follows:—

The expression “personal chattels” shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery, as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale.

Definition of
the term
“personal
chattels”

(*n*) *Exp Close, Re Hall*, 14 Q B D. 597.
at p 394

(*o*) *Exp Conning, Re Steele*, L R
16 Eq 414 See *Tennant v Howatson*,
13 App Cas 489.

(*p*) *Cooté v. Jecks*, L R 13 Eq

(*q*) *Brooker v Harrison*, 6 L R Ir.

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(*r*) *Grigg v National Guardian As-
surance Co*, (1891) 3 Ch 206

(*s*) *Horsley v. Style*, 69 L T 222.

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Extent of
definition.

The expression "personal chattels" has the same meaning in the Act of 1882 as in the principal Act (*t*)

"Goods, furniture, fixtures, and other articles capable of complete transfer by delivery" were included in the definition of personal chattels given by the Act of 1854, and it was held that this definition of personal chattels is only for the purposes of the Bills of Sale Acts, and not for all purposes (*u*).

The law as to fixtures and growing crops is altered by sect 4 of the Act of 1878, in other respects the language of sect 17 of 1854 is unaltered, and the decisions under that Act appear to be still applicable

Goods, &c
passing by
delivery

It has been seen that the expression "chattels personal" may have an extended meaning so as to include all personal property other than chattels real (*x*); but for the purposes of the Bills of Sale Acts only such goods, &c, are deemed to be "personal chattels" as are capable of complete transfer by delivery. The legal meaning of the expression "delivery" has been considered elsewhere (*y*)

Fixtures and
growing
crops

The definition "personal chattels" for the purposes of the Acts also includes fixtures or growing crops when separately assigned or charged.

Fixtures.

Under the Act of 1854, it was held that the word "fixtures," no less than the immediately following words, "and other articles," was controlled or qualified by the succeeding words, "capable of complete transfer by delivery" (*z*), and that "fixtures" meant things which, in contemplation of law, have a separate existence as fixtures, as distinct from their connection with and adhesion to the freehold (*a*); but the Act of 1878 apparently includes all fixtures, if separately assigned or charged, whether capable of delivery or not at the time of the execution of a bill of sale thereof so as to require registration of such bill of sale

Growing
crops.

Growing crops were not included in the definition of "personal chattels" given by the Act of 1854; and accordingly it was held that an assignment of growing crops did not require registration under that Act (*b*); but now though, if assigned together with the land, they are not within the Acts of 1878 or 1882, yet, as

(*t*) See sect 3 of the Act of 1882
(*u*) *Meux v Jacobs*, L R 7 H L

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(*x*) See *ante*, p. 172

(*y*) See *post*, p. 1461

(*z*) *Waterfall v Penstone*, 3 Jur N. S. 17; 6 E. & B. 876.

(*a*) *Exp Daglish*, L R 8 Ch A 1080, 1081

(*b*) *Brantom v Griffiths*, 2 C P D 212, C A. See *Newman v Cardinal*, 2 F & F 840, *Exp Payne, Re Cross*, 11 Ch D 539, C A.

soon as severed from the land, they become personal chattels, and an assignment thereof will be a bill of sale, and require registration, whether or not the same instrument also contains an assurance of an interest in the land (e). If growing crops not severed are assigned separately from the land on which they are growing, they are personal chattels within the meaning of sect 4 of the Act of 1878, and a bill of sale thereof must be registered accordingly (d), though, as will be seen presently (e), such a bill of sale need not comply with the formalities prescribed by the Act of 1882

The Act of 1878 also contains the following enactment:—

Sect 7 No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same person or persons.

Fixtures or growing crops not to be deemed separately assigned when the land passes by the same instrument

The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the commencement of this Act, and then subsisting and in force, in all questions arising under any bankruptcy, liquidation, assignment for the benefit of creditors, or execution of any process of any Court, which shall take place or be issued after the commencement of this Act.

The expression "personal chattels," for the purposes of the Bills of Sale Acts, also includes trade machinery, as to which the Act of 1878 contains the following provisions:—

Trade machinery

Sect 5 From and after the commencement of the Act, trade machinery shall, for the purposes of the Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof, which would be a bill of sale as to any other personal chattels, shall be deemed to be a bill of sale within the meaning of the Act

Application of Act to trade machinery

For the purposes of the Act—

"Trade machinery" means the machinery used in or attached to any factory or workshop;

1st. Exclusive of the fixed motive powers, such as the water wheels and steam engines, and the steam boilers, donkey engines, and other fixed appurtenances of the said motive powers, and

(c) *Exp National Mercantile Bank, Re Phillips*, 16 Ch D 104, C. A.

(d) *Clements v. Matthews*, 11 Q. B. D. 808, C. A.

(e) See *post*, p. 1461.

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2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose, and

3rd Exclusive of the pipes for steam, gas, and water, in the factory or workshop

The machinery or effects excluded by the section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of the Act

"Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say,

- (a) In or incidental to the making any article or part of an article, or
- (b) In or incidental to the altering, repairing, ornamenting, finishing, of any article, or
- (c) In or incidental to the adapting for sale any article.

Extent of
definition

The definition of "trade machinery" given in this section is apparently only for the purposes of the Bills of Sale Acts, not for all purposes (*f*).

A mortgage of land, whether legal (*g*) or equitable (*h*), will pass, without necessity for registration as a bill of sale, to the mortgagee, the fixtures on the land and, as such, all trade machinery which is affixed or annexed to the land. And the rule applies equally where the conveyance expressly mentions such machinery, either by reference to a schedule or otherwise (*i*).

But sect 7 of the Act of 1878 does not apply to trade machinery; and, accordingly, if the mortgagee desires that his power of sale shall enable him to seize and sell the fixed trade machinery apart from the land, he must take a bill of sale of the machinery (*k*). And the same rule will apply if, on the construction of the mortgage deed, it appears that the mortgagee has impliedly such a power (*l*).

A written agreement for securing unpaid purchase-money,

(*f*) See *Meux v. Jacobs*, L. R. 7 H. L. 481

(*g*) *Re Yates, Batchelor v. Yates*, 38 Ch. D. 112, C. A. See *Exp. Moore and Robinson's Banking Co., Re Armytage*, 14 Ch. D. 379, *Longbottom v. Barry*, L. R. 5 Q. B. 123, *Sheffield and South Yorks. &c., Building Society v. Harrison*, 15 Q. B. D. 358

(*h*) *Exp. Lusty, Re Lusty*, 60 L. T. 160.

(*i*) *Re Brooke, Brooke v. Brooke* (No. 2), (1894) 2 Ch. 600. See, further, as to fixtures generally, including trade machinery, *ante*, p. 120

(*k*) *Re Yates, Batchelor v. Yates*, 38 Ch. D. 112, C. A. See *Clumpson v. Coles*, 23 Q. B. D. 465, *Jarvis v. Jarvis*, W. N. (1893) 138

(*l*) *Small v. National Provincial Bank of England*, (1894) 1 Ch. 686.

whereby it was provided that, in certain events, the vendors should have power to enter on the land sold, and take possession thereof and of everything placed thereon, and "which should not require registration within the Bills of Sale Act, 1878," was held not to include trade machinery within the meaning of the Act, but to be valid in other respects without registration (*m*)

A vendor's lien, being given by law, will extend to trade machinery affixed to land; there is nothing which can be registered (*n*)

Vendor's lien

The exception from the definition of trade machinery applies to the excepted articles, though they are not actually affixed to the land with which they are assigned; and the effect of the exception is to exclude the excepted articles from the definition of "trade machinery" for all purposes, so that an assignment of such articles does not require registration under the Act of 1878, and, if by way of security for money, need not be in compliance with the requirements of the Act of 1882 (*o*)

Articles excepted from the definition

A deed, though void as a bill of sale as comprising trade machinery within the definition, may be valid as to articles comprised therein and excluded from the definition (*p*).

The Factory and Workshop Act, 1878 (*q*), gives a definition, for the purposes of that Act, of factory and workshop. See cases thereon (*r*).

"Factory or workshop"

v.—What Things are not Personal Chattels within the Acts.—Fixtures and growing crops assigned together with the land are excepted from the operation of the Bills of Sale Acts

Fixtures and growing crops assigned with land.

It has been seen that a mortgage of freeholds or copyholds will pass without mention all fixtures properly so called, that is to say, all articles which are affixed or attached to the soil, except such articles as by custom or judicial decision have come to be regarded as tenant's fixtures, and removeable by a tenant or his assigns during or on the expiration of his tenancy, and further, that a mortgage of leaseholds will pass not only the lessee's interest in the land and in the landlord's fixtures as part

(*m*) *Re London & Lancashire Paper Mills Co*, W N (1888) 36

(*n*) *Re Fulan Ironworks Co*, W N. (1888) 37

(*o*) *Topham v Greenside Glazed Firebrick Co*, 37 Ch D 281

(*p*) *Re Burdett, Exp. Byrne*, 20 Q

B D. 310, C A.

(*q*) 41 & 42 Vict c 16, s 93

(*r*) *Palmer's Shipbuilding Co. v Chaytor*, L R 4 Q B 209, *Kent v. Astley*, L R 5 Q. B 19, *Beadon v. Parrott*, L R 6 Q B 718, *Redgrave v Lea*, L R 9 Q B 363

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thereof, but also, without special mention, all tenant's fixtures belonging to the mortgagor, and removeable by him as against his landlord (*s*); but by sect 7 of the Act of 1878 (*t*) an assignment of fixtures (other than trade machinery) together with the land, will not require registration by reason only of its specifically mentioning the fixtures assigned

Similarly, an assurance of land will pass the crops growing thereon, and also future crops as they arrive at maturity (*u*). So a mortgage by a tenant of all his tenant-right and interest yet to come has been held to pass the future crops (*x*).

Stock and shares

Sect. 4 of the Act of 1878 also excepts from the definition of personal chattels, for the purposes of the Bills of Sale Acts, shares and interests in Government stocks, &c, and in the capital or property of companies which do not seem to require any detailed consideration; also choses in action (*y*).

Choses in action

The exception of choses in action covers book debts accruing in the ordinary course of trade, a mortgage or charge of which, therefore, need not be according to the statutable form, and will not require registration under the Act (*z*).

Book debts.

If it is intended that stock in trade and book debts should be assigned as a security for the same loan, it will generally be advisable that the two different kinds of property should be assigned by separate instruments (*a*).

Share in partnership.

A share in a partnership is a chose in action within the exception of sect. 4; so that a mortgage of such a share, though expressly including plant, stock in trade, and effects, is not within the Bills of Sale Acts, and does not require registration (*b*); such a mortgage only entitles the mortgagee to an account of the profits and property of the partnership, and does not entitle him to seize any specific effects as representing the share of the mortgagor (*c*).

Rights to chattels.

An assignment of rights under an agreement for hire and purchase of furniture is not within the Acts (*d*). Nor is an assignment of a reversionary interest in chattels bequeathed by will (*e*).

(*s*) See *ante*, p 121.

(*t*) See *ante*, p 205

(*u*) *Bagnall v. Villar*, 12 Ch D. 812; *Re Gordon*, 61 L T 299

(*x*) *Petch v Tutin*, 15 M. & W. 110.

(*y*) See *ante*, p 201

(*z*) See further as to mortgages of debts, *post*, p 302.

(*a*) See *post*, p 230.

(*b*) *Exp Fletcher, Re Bainbridge*, 8 Ch D 218

(*c*) See *post*, p 507

(*d*) *Re Davis, Exp Rawlings*, 22 Q B D 193, C A

(*e*) *Re Singleton, Exp Tritton*, 61 L T 301

vi.—Exception of Debentures—By sect. 17 of the Act of 1882, CHAPTER XIV
it is enacted that—

“Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital, stock, or goods, chattels and effects of such company” Debentures to which Act not to apply

The effect of the exclusion of debentures from the operation of the Act of 1882 is to exempt them also from the operation of the Act of 1878, and accordingly from any necessity that they should be registered as bills of sale (*f*). Effect of this enactment

A debenture, within the meaning of this section, may consist of a single document charging property with payments of sums advanced by several lenders (*g*), but the document must create or acknowledge a specific debt (*h*). Meaning of “debenture”

Where debentures were not charged upon any property of the company, but were secured by an assignment of property which was not duly registered as a bill of sale, it was held that the debenture was not within the exception (*i*). But in a later case it was intimated that a covering trust deed is not within the Acts, and it was held that, even if the covering deed be void for want of registration, the debentures may be so framed as of themselves to create, by virtue of sect 17, a valid equitable charge in favour of the debenture holders without registration (*k*). Whether covering trust deed must be registered

The words, “or other incorporated company,” are not limited to companies *ejusdem generis* with mortgage or loan companies, but include any company for the registration of the mortgages of which provision is made by the Companies Clauses Act, 1845, or the Companies Act, 1862 (*l*). But companies, in the case of which no statutory provision has been made for the registration of their mortgages, are not exempted by sect 17 from the necessity that their debentures or mortgages should be registered, and should in other respects comply with the requirements of the Bills of Sale Acts (*m*). What companies are within sect. 17

By sect 1 of the Bills of Sale Act, 1890 (*n*), letters of hypo- Exemption of letters of

(*f*) *Read v Joannon*, 25 Q B D 300. See *Re Asphaltic Wood Pavement Co*, W N (1883) 152, *John Welsted & Co v Swansea Bank*, 5 T L R 332.

(*g*) *Edmonds v Blaina Furnaces Co*, 36 Ch D 215. See *Levy v Abbercorris Slate, &c Co*, 37 Ch D 260.

(*h*) *Topham v Greenside Glazed Firebrick Co*, 37 Ch D 281.

(*i*) *Brocklehurst v Railway Printing*

Co, W. N (1884) 70, *Jenkinson v Brandley Mining Co*, 19 Q B D 568.

(*k*) *Ross v Army and Navy Hotel Co*, 34 Ch D 43, C A.

(*l*) *Re Standard Manufacturing Co, Exp Lowe*, (1891) 1 Ch 627, C A, see *Re Opera, Ltd*, (1891) 3 Ch 260.

(*m*) *Great Northern Rail Co v Coal Co-operative Society*, (1896) 1 Ch 187.

(*n*) 53 & 54 Vict c 53.

CHAPTER XIV
 hypothecation
 of imported
 goods from
 45 & 46 Vict
 c 43, s 9

the cation of imported goods were exempted from the provisions of sect. 9 of the Act of 1882, which requires bills of sale to be in accordance with the statutable form in the schedule to that Act, but in other respects the documents so exempted were left within the operation of the Bills of Sale Acts

Exemption of
 securities on
 imported
 goods from
 41 & 42 Vict
 c 31, and
 45 & 46 Vict.
 c 43

But by the Bills of Sale Act, 1891 (*o*), it is enacted that sect 1 of the Act of 1890 shall be read as follows:—

“An instrument charging or creating any security on, or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being reshipped for export, or delivered to a purchaser, not being the person giving or executing such instrument, shall be deemed a bill of sale within the meaning of the Bills of Sale Acts, 1878 and 1882 ”

vii.—After-acquired Chattels—By the Act of 1882, it is enacted as follows.—

Bill of sale to
 have schedule
 of property

Sect 4 “Every bill of sale shall have annexed thereto or written thereon a schedule of the personal chattels comprised in the bill of sale, and such bill of sale, save as hereinafter mentioned (*p*), shall have effect only in respect of the chattels specifically described in the said schedule, and shall be void, except as against the grantor, in respect of any personal chattels not so specifically described ”

Bill of sale
 not to affect
 after-acquired
 property

Sect 5 “Save as hereinafter mentioned, a bill of sale shall be void, except as against the grantor, in respect of any personal chattels specifically described in the schedule thereto, of which the grantor was not the true owner, at the time of the execution of the bill of sale ”

Exceptions

But sect. 6 thereof excepts out of these sections growing crops separately assigned or charged, and fixtures, plant or trade machinery substituted for fixtures, plant, or trade machinery specifically described in the schedule (*q*).

General effect
 of above
 enactments

The effect of these sections (except as regards the articles excluded by sect 6) is to render nugatory, except as against the grantor, any attempt to assign or charge, by a bill of sale given by way of security for payment of money, any after-acquired chattels of the grantor, whether specifically described or not. And, by the operation of sect 9 of the same Act, such a bill of sale, purporting to assign after-acquired chattels by a general description, is absolutely void, even as against the grantor

(*o*) 54 & 55 Vict c 35

(*p*) The words, “save as hereinafter mentioned,” apparently refer to the exception as regards the grantor in the last clause of this section, as well as to

the exception of the things mentioned in sect 6

(*q*) See this section set out *post*, p 216

himself, as not being in accordance with the statutable form (*r*). The result is that the law relating to assignments by way of mortgage of after-acquired chattels (with certain exceptions), is virtually abrogated so far as regards instruments made on or after the 1st of November, 1882

Inasmuch, however, as the inclusion in a bill of sale of after-acquired property is nowhere expressly forbidden by the Act of 1878 or the Act of 1882, questions may, possibly, still arise under bills of sale made previously to that date, and kept alive by re-registration, or may arise as between grantor and grantee under the Act of 1882, and, accordingly, the former law as to assignments of after-acquired chattels will be here very briefly noticed.

Inclusion of after-acquired property in bills of sale prior to 1st November, 1882

As a general rule, an assignment would not at common law have passed chattels not in existence, or not in the ownership of the grantor, at the time of the assignment, unless the grantor did some act after he acquired the property in furtherance of the original disposition and amounting to a ratification thereof (*s*), or, unless the mortgage was so framed as to give to the mortgagee licence or a power of seizing future chattels of the grantor as they should be acquired by him and brought upon the premises, and such licence is acted upon (*t*).

After-acquired chattels not generally assignable at common law

But in equity, where the assignment included future chattels, or if there was a covenant that all future chattels should be included in the security, the interest in such future chattels passed, and attached without possession as soon as the chattels were brought on the premises (*u*)

Secus, in equity

Where a bill of sale included future chattels brought on the premises, and the mortgagor became bankrupt and was discharged, it was held that the security did not include chattels brought on the premises after the discharge, for that the assignment of those chattels amounted only to a contract to assign from which he was released by the discharge (*x*)

A power to seize after-acquired goods might be inserted in a

Power to seize after-

(*r*) *Thomas v Kelly*, 13 App Cas 506, *Hadden, Best & Co v Oppenheim*, 60 L T 962

(*s*) *Bac Max*, r 14, *Perk Profit*, Bk tit "*Grant*," pl 65

(*t*) *Per Tindal, J*, in *Lunn v Thornton*, 1 C B 379 See *Carr v Allott*, 27 L J Ex 385

(*u*) *Holroyd v Marshall*, 10 H L C 191, *Congreve v Evetts*, 10 Exch 298,

Hope v Hayley, 5 E & B 830, *Carr v Acraman*, 11 Exch 566, *Lomas v Buxton*, L R 6 C P 107, *Belding v Reed*, 3 H & C 955 See *Reeves v Barlow*, 12 Q B D 436, C A

(*x*) *Collyer v Isaacs*, 19 Ch D 342, C A See *Thompson v Cohen*, L R 7 Q B 527, *Cole v Kernot*, L R 7 Q B 534, n

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acquired
chattels

mortgage deed, and would operate by way of licence, which, being for valuable consideration, would be irrevocable (*y*) Such a power followed by actual seizure, vested the property, at law, in the grantee (*z*); and a power to seize would, without actual seizure, create a good equitable charge upon after-acquired chattels, which would have priority over execution creditors (*a*) If the licence were not so framed as to operate in equity as a present assignment, and if the grantor were to become bankrupt before seizure, the title of his trustee in bankruptcy would prevail (*b*); but a power to seize future chattels would not of itself make a bill of sale fraudulent and an act of bankruptcy (*c*)

Effect of
Judicature
Act

The effect of the Judicature Act, 1873 (*d*), is not to abolish the distinction between legal and equitable interests, but merely to enable all branches of the High Court to administer both legal and equitable principles; and, accordingly, notwithstanding this Act, an assignment of after-acquired chattels still passes only an equitable interest to the assignee, and if, after the chattels have come into existence and before the mortgagee has taken possession of them, another person, without notice of the mortgage, acquires the legal title to the chattels, his title will prevail, both at law and in equity, against that of the mortgagee (*e*).

Intention to
include after-
acquired
chattels must
be clear

The intention to include after-acquired property must be clear, and will not be inferred from doubtful expressions (*f*) And, accordingly, a bill of sale of the furniture and effects in a certain house, or of bricks, &c, upon certain building land, will not pass after-acquired chattels, though there is a power to enter and seize all goods which may be upon the premises (*g*).

After-
acquired

After some conflict of opinion, it is now settled that an

(*y*) *Lunn v Thornton*, 1 C. B. 385
But see *Carr v. Acaman*, 11 Exch
566

(*z*) *Congreve v. Evetts*, 10 Exch 298,
Hope v Hayley, 5 E. & B. 830 See
Cole v. Kenot, L. R. 7 Q. B. 534, n.,
Morris v. Delobel-Flipo, (1892) 2 Ch
352

(*a*) *Langton v Horton*, 1 Ha. 549,
Hoboyd v Marshall, 10 H. L. C.
191

(*b*) *Carr v Acaman*, 11 Exch 566
See, also, *Reeve v Whitmore*, 4 De G.
J. & S. 1, *Carr v. Allatt*, 27 L. J. Ex.
385, *Brown v Bateman*, L. R. 2 C. P.
272.

(*c*) *Hutton v. Cruttwell*, 1 E. & B.
15

(*d*) 36 & 37 Vict. c. 66, s. 25, sub-s.
11

(*e*) *Joseph v Lyons*, 15 Q. B. D.
280, C. A., *Hallas v Robinson*, 15
Q. B. D. 288, C. A.

(*f*) *Tayfield v Hullman*, 6 Man. &
Gr. 245

(*g*) *Ibid*, *Reeves v Whitmore*, 4 De
G. J. & S. 1, *Exp Stephenson*, De G.
586 See also *Sladden v Sergeant*, 1
F. & F. 322, *Lunn v Thornton*, 1 C. B.
379, *Gale v Bunnell*, 7 Q. B. 850,
Rogers v Kennay, 11 Jur. 14, *Platt v*
Bromage, 24 L. J. Exch. 63, *Collyer v*
Isaacs, 19 Ch. D. 342

assignment in a bill of sale not falling within the Act of 1882, expressly including after-acquired chattels, will be valid and effectual if the chattels can be ascertained at the time when the security is enforced, though they may not be capable of ascertainment at the time when the security is given (*h*). CHAPTER XIV
chattels must
be ascertain-
able.

An assignment may, however, be so vague and uncertain that the Court will be unable to give it any effect (*i*)

The bill of sale of future chattels is generally made with reference to some specific place, and where it extended to chattels in a house, *or elsewhere*, it was held not to be effectual (*l*)

viii.—The Schedule or Inventory.—As regards bills of sale by way of security for money, made or given on or after the 1st November, 1882, sect. 4 of the Act of that year requires every such bill of sale to have a schedule of the personal chattels comprised therein. The schedule
or inventory.

This enactment deals with the material precision of the description as distinguished from the form thereof, which is dealt with by sect 9 of the same Act. Thus, a bill of sale which in the schedule thereto annexed specifically describes the chattels personal assigned with sufficient precision to satisfy the requirements of sect 4, but also includes in such schedule realty or chattels real, will be absolutely void as departing from the statutable form prescribed by sect. 9 (*l*). On the other hand, if a bill of sale in the form given by the Act is followed by an inventory which describes chattels, but as to some of them contains no specific description, such bill of sale, being in accordance with the form, could not be avoided by sect 9, but being imperfect under sect 4, it would be avoided as to the chattels imperfectly described against everyone but the grantor (*m*).

Formerly a schedule or inventory annexed or referred to in a deed was not deemed to be part of the deed, and would not have been altered to enlarge the operation of the deed by making it include things not covered by the general description of the parcels. So where a mortgage of chattels referred to an inventory for more particular enumeration, stock-in-trade included in the Whether
schedule will
enlarge
operation of
deed

(*h*) *Tasby v Official Receiver*, 13 App. Cas 523. See *Lazarus v Andrade*, 5 C. P. D 318.

(*i*) *Re D'Epineuil, Tudman v D'Epineuil*, 20 Ch. D 758.

(*l*) *Belding v Read*, 34 L. J. Exch. 212. See *Lazarus v Andrade*, 5 C. P. D 320, and *Leatham v Amor*, 47 L.

J. Q. B. 581, *Clements v Matthews*, 11 Q. B. D 808, 812, *Reeves v Barlow*, 12 Q. B. D 437.

(*l*) *Cochrane v Entwistle*, 25 Q. B. D. 116, C. A.

(*m*) *Per Fry, L. J., in Kelly & Co v Kelton*, 20 Q. B. D 569, C. A. at p. 574.

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inventory, but not mentioned in the deed, was held not to pass by it (*n*). It would seem, however, that the effect of the requirement of sect 4, that every bill of sale shall have annexed thereto, or written thereon, a schedule or inventory, is to make such schedule or inventory a necessary part of the deed, and that every article specifically mentioned in such schedule or inventory will be included in the security (*o*)

Schedule may limit operation of deed

On the other hand, even under the former Bills of Sale Acts, it was repeatedly held that if a bill of sale contained in its operative part a general description of the parcels, referring to a schedule for more particular description, only such articles as were specifically described in the schedule would pass by the deed (*p*) This rule is expressly enacted, except as against the grantor, by sect. 4 of the Act of 1882

Goods received after execution

Goods ~~not~~ ^{received} before, but not received by the grantor till after the execution of a bill of sale pass if sufficiently described in the schedule (*q*)

What description in schedule is sufficient.

The description of the mortgaged chattels in the schedule to the bill of sale must be sufficiently precise to render the chattels capable of identification The chattels must be as specifically described as is usual in such inventories as are usually made for business purposes with regard to the particular subject-matter (*r*) So the following description in the schedule to a bill of sale given by a picture dealer—"at 47, M—— Street, 450 oil paintings in gilt frames, 300 oil paintings unframed, 50 water-colours in gilt frames, 20 water-colours unframed, and 20 gilt frames"—was held to be an insufficient description within the requirements of sect 4, it not being shown that the things described were all the things in the grantor's shop (*s*) Still less is a mere general description sufficient, such as "all household furniture and effects," or the like, at a certain place (*t*) But if it appears that articles described by way of enumeration in the schedule are the only articles upon the premises answering the description, it would seem that the description will be sufficient (*u*). So the following description in a

(*n*) *Exp Jardine, Re McManus*, L R 10 Ch A 322

(*o*) See *Mehville v Stringer*, 12 Q B D 132

(*p*) *Wood v. Rowcliffe*, 6 Exch. 407, *Mee v. Parren*, 15 L T N S 320, *Harrison v Blackburn*, 17 C B N S 678, *Douling v Stuard*, W N (1885) 98

(*q*) *Sutton v. Bath*, 1 F & F 152,

Sladden v Sergeant, 1 F & F 322.

(*r*) Per Lord Esher, M R, in *Witt v Banner*, 20 Q B D 114, C A at p 118

(*s*) *Witt v Banner*, *sup* See, also, *Carpenter v Deen*, 23 Q B D 566

(*t*) *Roberts v Roberts*, 13 Q B D 794

(*u*) *Hackley v Greenwood*, 25 Q B D 277.

schedule was held to be sufficient—"the whole of the chattels and things at present at W— Vicarage, and consisting, *inter alia*, of study. 1,800 volumes of books as per catalogue"—the articles not being individually described and the catalogue not being annexed to the schedule (*x*).

A mere clerical error in description, not calculated to deceive, will not avoid a bill of sale on the ground of misdescription of the chattels (*y*).

Clerical errors in description

Sect 5 of the Act of 1882 avoids, except as against the grantor, a bill of sale of chattels of which the grantor was not the "true owner" at the time of executing the bill of sale (*z*).

Bill of sale must be given by the true owner of chattels
Meaning of "true owner"

The "true owner" of personal chattels within the meaning of sect 5 includes the person who is the legal owner thereof at the time of the execution of the bill of sale, whether he is also the beneficial owner or only trustee for another (*a*).

A registered bill of sale by the equitable owner of goods which were in the possession of his trustee for sale, was held to be void (*b*).

So, also, where a bill of sale was given to secure an advance, and subsequently the grantor became bankrupt, and the grantee, in ignorance of the bankruptcy, took a second bill of sale in substitution for the first, it was held that, inasmuch as the grantor at that time had no interest or power over the goods, the second bill was utterly nugatory, and left the first bill unaffected (*c*).

Goods bought before, but received after, execution of a bill of sale, would be in the true ownership of the grantor, and have been held to pass if mentioned in the schedule (*d*).

Although sect 5 seems to have been primarily aimed at assignments by debtors of future plant and stock in trade, the enactment clearly applies also to other matters.

Thus, where chattels were assigned by way of absolute gift by a deed which, though unregistered, was not absolutely void, and the grantor subsequently executed another bill of sale to secure an advance which was registered; it was held that, at the time of the execution of the subsequent bill, the grantor was not

(*x*) *Davidson v Carlton Bank*, (1893) 1 Q B 82, C A

(*y*) *Simmons v Hughes*, 34 S J 659

(*z*) *Ante*, p 210

(*a*) *Re Sarl, Exp Williams*, (1892) 2 Q B 591

(*b*) *Chapman v. Knight*, 5 C P D. 308.

(*c*) *Re Borgen, Exp Hasluck*, (1894) 1 Q B 444

(*d*) *Sutton v Bath*, 1 F & F 152, *Sladden v. Sergeant*, 1 F & F. 322.

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the true owner of the goods, and, consequently, the bill was void except as against the grantor (*e*)

But a person who has given a bill of sale by way of security for an advance still has the equity of redemption of the goods, and remains the "true owner" thereof, so as to enable him to give a subsequent bill for the same goods (*f*)

On avoidance of a bill of sale for want of renewal, the grantor will thereupon become the true owner of the goods, so as to be able to give a fresh bill of sale thereon (*g*)

Joint owners

A joint owner of goods is a "true owner thereof" to the extent of his interest (*h*) So, also, a partner in respect of the property of a firm (*i*).

Husband and wife

A bill of sale was held to be valid which was given by a wife, without the concurrence of her husband, of goods which were in the house in which they both resided together, and which by ante-nuptial agreement belonged to the wife for her separate use (*l*)

By sect 6 of the Act of 1882, it is enacted as follows:—

Exception as to growing crops and substituted fixtures

Nothing contained in the foregoing sections of this Act shall render a bill of sale void in respect of any of the following things, (that is to say)—

- (1) Any growing crops separately assigned or charged, where such crops were actually growing at the time when the bill of sale was executed
- (2) Any fixtures separately assigned or charged, and any plant, or trade machinery where such fixtures, plant, or trade machinery are used in, attached to, or brought upon any land, farm, factory, workshop, shop, house, warehouse, or other place in substitution for any of the like fixtures, plant or trade machinery specifically described in the schedule to such bill of sale

Effect of this enactment

The effect of this enactment is that bills of sale of growing crops though assigned separately from the land, and of substituted fixtures and trade machinery, are excepted out of the operation of the Act of 1882, so that such bills need not be in strict conformity with the statutable form prescribed by sect 19 of that Act, and will, if duly registered, be valid as against not

(*e*) *Tuck v Southern Counties Deposit Bank*, 42 Ch D 471, C A.

(*f*) *Thomas v Seales*, (1891) 2 Q B. 408, C A. See *Usher v Martin*, 24 Q B D 272

(*g*) *Fenton v. Blythe*, 25 Q B D. 417.

(*h*) *Exp Pratt, Re Field*, 63 L T 289

(*i*) *Exp Barnett, Re Tamplin*, W N (1890) 48

(*l*) *Walton v Goldman*, 16 Q B D 121

only the grantor but all other persons, though such property is not specifically described in a schedule as required by sect 4, and though the grantor is not the true owner thereof at the time of the execution of the bill of sale as required by sect 5

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It would seem, however, that in order that crops may pass, there must be already the foundation of an interest in the grantor (*l*). Thus, before the Bills of Sale Acts, it was held that the future fruits of an estate might be granted by a person having an interest in the land (*m*); and that the next year's wool of sheep belonging to the grantor was capable of being assigned (*n*). If, however, there was a foundation of interest, it was not necessary that a grantor should actually be in possession of the property from which the produce assigned was to issue. So a security was held to extend to growing crops on a farm not then occupied by the grantor (*o*), and to goods in a house afterwards built (*p*).

Growing crops.

After a bill of sale of growing crops by a tenant, the landlord and tenant agreed to a surrender of the tenancy, the legal title in the growing crops vested in the landlord, which the grantee under the bill of sale had no equity to displace, and the value of the crops being less than the cost of reaping and the rent due at the time of the surrender, under no view could the bill of sale holder claim anything (*q*).

Right to growing crops after surrender by tenant

Before the present Bills of Sale Acts it was held that machinery, substituted for machinery specifically assigned by way of mortgage, might be effectually included in the security (*r*).

Machinery

Horses of a cab proprietor are not "plant" within the meaning of sect 6 (2) of the Act of 1882 (*s*).

Plant

ix.—Apparent Possession—Section 4 of the Act of 1878 further enacts as follows:—

"Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving the bill of sale, so long as they remain in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person"

What is apparent possession

(*l*) Bac Max Rule 14
(*m*) *Grantham v Hawley*, Hob 132.

(*n*) *Perkins*, Pl 90

(*o*) *Car v Allatt*, 27 L J Exch 385

(*p*) *Chudell v Galsworthy*, 6 C B N S 471

(*q*) *Clements v Matthews*, 11 Q B

D 808, C A

(*r*) *Holroyd v Marshall*, 10 H L 191, *Leatham v Amor*, 47 L J Q B 581, *Lazarus v Andrade*, 5 C P D 320

(*s*) *London and Eastern Counties Loan, &c Co. v. Creasey*, (1897) 1 Q B 768, C A

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This question
not material
as to bills of
sale by way
of security

This section is identical with sect. 7 of the Act of 1854, and the decisions as to apparent possession under the earlier Act appear to be still applicable. Inasmuch, however, as, by virtue of sect 5 of the Act of 1882 (*s*), the validity of bills of sale given after the 1st November, 1882, by way of security, depends not upon apparent possession, but upon true ownership at the time of giving the bill, it is obvious that, except as regards bills so given before that date and subsequently renewed, and as regards absolute bills of sale (the consideration of which is not material to the present purpose), the doctrine of apparent possession is of no practical importance. The decisions on apparent possession will, therefore, be here very briefly noticed.

Avoidance of
unregistered
bills of sale

Before the Act of 1882 came into operation, all bills of sale, whether given absolutely or by way of security, were required by sect 8 of the Act of 1878 (*t*) to be registered within the time and in the manner prescribed; or, otherwise, such bills of sale were to be deemed to be fraudulent and void as against trustees and execution creditors of the persons whose goods were comprised in such bills of sale so far as regards chattels which, at the time of such person's bankruptcy or liquidation or process executed, and after seven days after the making of the bill of sale, were in the possession or the apparent possession of the person making the bill of sale.

Possession by
grantee
within seven
days

If, after any bill of sale, possession is taken by the grantee within the time prescribed by the Act, and retained, the case does not fall within the Act, and no registration is necessary, as there is not "apparent possession" within that time (*u*).

The occupation of the grantor must be an actual *de facto* occupation; his being a tenant of the premises, but residing elsewhere, is not sufficient (*x*); and wrongful possession takes the case out of the statute (*y*). The possession of the bailee of the grantor is the possession of the grantor (*z*).

Joint possession of husband and wife

Where furniture was assigned by a husband for valid consideration to a trustee for his wife's separate use, and the furniture remained in the joint possession of the husband and wife,

(*s*) See *ante*, p. 210.

(*t*) This section is repealed by sect 15 of the Act of 1882, but so as not to affect the validity of anything previously done.

(*u*) *Marples v. Hartley*, 3 E & E 610, *Hall v. Day*, 5 L T N S 398, *Hollingsworth v. White*, 6 L T. N. S.

604, Q B, *Exp. Harris, sup.*, *Banbury v. White*, 2 H & C 300, *Mumster v. Price*, 1 F & F 686.

(*x*) *Robinson v. Briggs*, L R 6 Ex 1. See *Exp. Morrison, Re Westray*, 42 L T 158.

(*y*) *Exp. Fletcher*, 5 Ch D 809, C A
(*z*) *Ancona v. Rogers*, 1 Ex D 285.

the assignment was held to fall within the Act, the joint possession not being sufficient to prevent its operation (*a*)

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Where joint owners of chattels mortgage them by an unregistered bill of sale, and one becomes bankrupt, his moiety of the chattels at the date of the bill of sale alone passes to the trustee (*b*), though he had subsequently purchased the other moiety (*b*)

Joint owners

Where a purchaser of growing crops had taken charge and employed labourers of his own to tend and cultivate them, the land remaining in the possession of the vendor, it was held that enough had been done to take the goods out of the apparent possession of the vendor (*c*)

Growing crops

Where the grantor was manager of the business and used the furniture comprised in the bill of sale as part of his salary, the goods were held to be in his apparent possession (*d*) If a purchaser lets the chattels to the vendor without change of possession, the case falls within the Acts.

Grantor manager

When the debtor and his family were allowed the use of the goods, they were held to be in his apparent possession (*e*), although a man was formally in possession for the grantee (*f*) It was otherwise where the goods were under the control of the man in possession, who was there to see that the use was in accordance with the rights of the bill of sale holders (*g*).

Man in possession

To satisfy the Bills of Sale Acts, the possession must be apparent as well as real (*g*); but under the order and disposition clause in bankruptcy, a real possession, even though it be friendly, is sufficient (*h*); and where some part of the grantor's family only was left in possession, the delivery was held complete (*i*)

By packing up to send away, the grantee takes possession within the Act (*h*) An advertisement for sale by the grantee in possession, though in the house of the grantor, was sufficient possession in the former (*i*), but a placard for sale, not specifying for whom, amounted to nothing (*i*)

Other acts of taking possession

(*a*) *Ashton v Blackshaw*, L R 9 Eq 510 See *Minster v Price*, 1 F & F 686. *Reynolds v Bowley*, L R 2 Q B 474

(*b*) *Exp Brown, Re Reed*, 9 Ch D 389, C A

(*c*) *Gough v Everard*, 2 H & C 1, doubting *Sheridan v McCartney*, 11 Ir Com L R 506

(*d*) *Pichard v Marriage*, 1 Ex D 364, *Preston v Lamont*, 1 Ex D 361, *Lincoln Wagon Co v Mumford*, 41 L T 655

(*e*) *Exp Jay*, L R 9 Ch A 697

(*f*) *Exp Hooman*, L R 10 Eq 63, *Exp Lewis*, L R 6 Ch A 626, *Exp Mutton*, L R 14 Eq 178, *Seal v Claridge*, 7 Q B D. 516, C A., *Exp Morilock*, W. N (1881) 161

(*g*) *Re Francis*, 10 Ch D 408, 414, C A

(*h*) *Re Francis*, 10 Ch D. 408, C A

(*i*) *Davies v Jones*, 10 W R 779

(*k*) *Exp Jay*, L R 9 Ch A 697

(*l*) *Emanuel v Brdger*, L. R 9 Q B

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Demand
insufficient.

Actual possession must be taken by the grantee; a demand, accompanied by a threat to take the goods by force, will not be sufficient (*m*), the effect of such demand is different under the reputed ownership clause in bankruptcy, for after demand the goods cannot be said to be in the possession of the debtor with the consent of the true owner (the creditor) (*n*)

Where a bill of sale holder put a man in possession of the grantor's premises and advertised his goods for sale, but allowed the grantor to remain in the house, it was held that this amounted to taking actual possession of the goods (*o*).

Possession of
sheriff

Possession of the sheriff under an execution by the grantee or a third person at the time of filing the petition for bankruptcy, takes the case out of the statute (*p*), although the name of the grantor, with that of another person, is on the door of the workshop (*q*) So, also, it would seem, possession by a receiver (*q*)

Where the holder of an unregistered bill of sale seized the goods comprised therein, and afterwards sold them *bonâ fide* to the son of the grantor, in whose home the grantor lived, it was held that the bill of sale, being satisfied and gone, the Bill of Sale Act did not apply, and that the goods were not in the apparent possession of the grantor so as to render them liable to seizure by an execution creditor (*r*)

X.—Power of Seizure.—By sect. 7 of the Act of 1882, it is enacted as follows:—

Bill of sale
with power to
seize, except
in certain
events, to be
void.

“Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes —

- (1.) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security,
- (2.) If the grantor shall become a bankrupt, or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes,
- (3.) If the grantor shall fraudulently either remove or suffer the said goods, or any of them, to be removed from the premises;
- (4.) If the grantor shall not, without reasonable excuse, upon

(*m*) *Ancona v Rogers*, 1 Ex D 285
See *Exp Conning*, L R 16 Eq 414
(*n*) *Brewin v Short*, 1 Jur N S
798, *Exp North-Western Bank*, L R
16 Eq 69, *Exp Harris*, L R 8 Ch A
48, *Exp Ward*, L. R. 8 Ch. A. 144.

(*o*) *Smith v Wall*, 18 L T N. S 182
(*p*) *Exp Saffery*, 16 Ch. D 668,
C A
(*q*) *Taylor v Echersley*, 5 Ch. D 740.
(*r*) *Swire v. Cookson*, 49 L T 736,
C A

demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes,

- (5) If execution shall have been levied against the goods of the grantor under any judgment at law,

Provided that the grantor may, within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such Court or judge, if satisfied that, by payment of money or otherwise, the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just."

This section incorporates into every bill of sale an implied power of seizure in any of the events mentioned (s). But an express power to seize the chattels may be inserted in a bill of sale, provided such power does not purport to be exerciseable in any event not specified in the section (t), and if the bill contains a proviso that there shall be no seizure for any cause other than those mentioned in the section (u).

Effect of this section

Sect 7 applies to goods seized after the commencement of the Act under a bill of sale registered before the Act (v).

If the bill expressly or impliedly provides for the seizure of the goods for any cause other than those specified in sect 7, the bill will be void (y); and in that case the proviso will not save the bill (z).

The default in payment giving rise to the power of seizure must be default "in payment at the time provided" by the bill of sale. A power to seize in default of payment on demand (a), or within a specified time after demand (b), will avoid the bill.

(1) Default in payment

Default in payment of capitalized interest cannot be made enforceable by seizure (c).

The power will be exerciseable on default in payment of any one instalment, though the bill contain no express provision to that effect (d).

It would seem that the power of seizure, being by sect. 7 exerciseable on default in performance of a covenant holding c

Default in performance of covenants

By sect v *Evans*, 18 Q B D

(a) *Hetherington v. Groome*, 18 Q B D 789, C A

(y) See *Royal Receiver, Re Mountt*, 22, C A

(b) *Bishop v. Beale*, 1 T L R 140, *Clemson v. Townsend*, 1 C. & E 418

See *Sibley v. Higgs*, 15 Q B D. 619, and see further on this point, *post*, p 237

(c) *Davis v. Burton*, 11 Q B D 537, C A

(d) *Re Wood, Exp Woolfe*, (1894) 1 Q B 605

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“Personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the following causes —

- (1) If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security,
- (2) If the grantor shall become a bankrupt, or suffer the said goods, or any of them, to be distrained for rent, rates, or taxes,
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Provided that the grantor may, within five days from the seizure or taking possession of any chattels on account of any of the above-mentioned causes, apply to the High Court, or to a judge thereof in chambers, and such Court or judge, if satisfied that, by payment of money or otherwise, the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just."

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This section incorporates into every bill of sale an implied power of seizure in any of the events mentioned (s). But an express power to seize the chattels may be inserted in a bill of sale, provided such power does not purport to be exerciseable in any event not specified in the section (t), and if the bill contains a proviso that there shall be no seizure for any cause other than those mentioned in the section (u).

Effect of this section

Sect 7 applies to goods seized after the commencement of the Act under a bill of sale registered before the Act (r)

If the bill expressly or impliedly provides for the seizure of the goods for any cause other than those specified in sect. 7, the bill will be void (y); and in that case the proviso will not save the bill (z).

The default in payment giving rise to the power of seizure must be default "in payment at the time provided" by the bill of sale. A power to seize in default of payment on demand (a), or within a specified time after demand (b), will avoid the bill.

(1) Default in payment

Default in payment of capitalized interest cannot be made enforceable by seizure (c).

The power will be exerciseable on default in payment of any one instalment, though the bill contain no express provision to that effect (d).

It would seem that the power of seizure, being by sect. 7 made exerciseable on default in performance of a covenant

Default in performance of covenants

(s) *Watkins v Evans*, 18 Q B D 386, C A

(t) *Exp Official Receiver, Re Mount*, 18 Q B D 22, C A

(u) *Duff v Valentine*, W N (1883) 225 See *Thomas v Kelly*, 13 App

Cas at p 519

(x) *Exp Cotton*, 11 Q B D 301

(y) *Davis v Burton*, 11 Q B D

537, C A

(z) *Re Williams, Exp Pearce*, 25 Ch

D 656

(a) *Hetherington v Grooms*, 13 Q B D 789, C A

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(d) *Re Wood, Exp Woolfe*, (1894)

1 Q B 605

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necessary for
maintaining
the security.

necessary for maintaining the security, will not be exerciseable on default in observance of a negative covenant (e). And possibly an attempt to make an express power so exerciseable might be held to vitiate the bill

Covenants to pay rates, rent, taxes, &c. (f), to pay insurance premiums and produce receipts (g), to repair or replace chattels (h), have been held to be covenants necessary for maintaining the security, on the breach of which the power of seizure will arise

The statutable form permits the insertion of terms which the parties may agree upon for "maintenance of the security" (i), but such agreement will not make the terms "necessary" if they really are not so (j), and an attempt to extend the power of seizure to breach of any such agreed terms as are not necessary will vitiate the bill (k).

(2) Bank-
ruptcy,

The words in a bill of sale, "if the grantor shall do or suffer any matter or thing whereby he shall become a bankrupt," were held to be substantially the same as "if the grantor shall become a bankrupt," and to be within sect 7, cl 2 (l)

For the purposes of the Bankruptcy Act, 1890, the word "bankrupt" is thereby meant to include a compounding or arranging debtor (m), but it is doubtful whether a composition or scheme of arrangement would give rise to the power of seizure under this section

The mere commission of an act of bankruptcy without adjudication will apparently not be sufficient (n).

If the grantor becomes bankrupt after seizure, the trustee in bankruptcy can only redeem by paying the whole amount owing on the bill of sale (o)

or distraint
for rent, &c

A landlord's right to distrain is paramount to a bill of sale. But some things are not distrainable at common law, viz, fixtures, things delivered to a person to be carried or worked in the way of his trade or business, cocks or sheaves of corn, things in actual use, and things in the custody of the law; also, pro-

(e) *Hyde v. Warden*, 3 Ex D. 72

(f) *Turner v. Culpan*, 58 L T 340, 506
W N (1888) 225

(g) *Hammond v. Hocking*, 12 Q B D 291, *Duff v. Valentini*, W N (1888) 225, *Watkins v. Evans*, 18 Q B D 386, C A

(h) *Consolidated Credit Corporation v. Gooney*, 16 Q B D 24, *Furber v. Cobb*, 18 Q B D 494, C A

(i) See *post*, p 234

(j) *Furber v. Cobb*, *sup* at pp 505, 506

(k) *Branch v. Offord*, 17 Q B D 484, *Real and Personal Advance Co v. Cleas*, 20 Q B D 304, C A

(l) *Exp. Allam, Re Munday*, 14 Q B D 43

(m) 53 & 54 Vict c 71, s 3 (16), (17)

(n) *Giboy v. Bowey*, 59 L T 223

(o) *Re Wood, Exp Wolfe*, (1894) 1 Q B 605

vided there is sufficient distress besides, beasts of the plough and instruments of husbandry, and the instruments of a man's trade or profession (*p*)

By sect 13 of the Act of 1882, chattels seized are to remain on the premises, and not to be removed or sold until after the expiration of five clear days from the day of seizure. During this period such of the chattels as are distrainable will continue liable to distraint. But the holder of a bill of sale may, with the consent of the grantor, remove the chattels either before seizure (*q*), or within the five days thereafter (*r*); and thereupon the chattels will become the property of the holder so as to exclude the operation of the statute 2 Geo II c 19, by which landlords are empowered to follow goods fraudulently removed, or recover double value; nor will the landlord have any right of action in respect of such removal.

It seems that a landlord who has distrained is not bound to hand over any surplus chattels, or proceeds of sale thereof, to the holder of a bill of sale of which he has received notice after distraint (*s*).

Where a grantee of a bill of sale, at the request of the grantor, paid out the landlord, who had distrained, and the grantor failed to repay to the grantee the amount so paid, the grantee was allowed to seize and sell the chattels comprised in the bill of sale (*t*).

As a general rule, a grantee who has paid out a distraining landlord is entitled to be reimbursed by the grantor the money so paid (*u*).

If a landlord distrains chattels, part of which are and part are not comprised in a bill of sale, the holder may require the goods not so comprised to be first applied in payment of the rent (*x*).

A bill of sale holder who delays taking possession of chattels till after expiration of the lease of the premises in which the chattels are, may be treated as a trespasser, and restrained from holding or selling the chattels (*y*).

By sect. 14 of the Act of 1882, a bill of sale within that Act

Distress for
taxes or rates

(*p*) See Byth & Jarm Conv vol 3, pp 170 *et seq* (4th ed.) See also Lyon & Redman, Law of Bills of Sale, 140.

(*q*) *Thornton v Adams*, 5 M. & S 38, *Bach v Meats*, 5 M. & S 200, *Fletcher v Marillier*, 9 A. & E 457.

(*r*) *Tomlinson v Consolidated Credit Corporation*, 24 Q. B. D 135, C. A.

(*s*) *Evans v Wright*, 2 H. & N 527.

(*t*) *Cowley v Tyler*, W. N. (1884) 77.

(*u*) *Edmunds v Wallingford*, 14 Q. B. D. 811, C. A., questioning *England v Marsden*, L. R. 1 C. P. 529, *The Orchis*, 15 P. D. 38, C. A.

(*x*) *Exp Stephenson*, De G. 586.

(*y*) *Smith v Brown*, 48 L. J. Ch. 694. See also *Clements v Matthews*, 11 Q. B. D. 808, C. A., *ante*, p. 213.

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is no protection against distress under a warrant for taxes or rates. Where a local authority took proceedings for the recovery of rates levied under the Public Health Act, 1875 (s), in the County Court under sect 261 of that Act, instead of by distress warrant under sect 256, it was held that sect 14 did not apply, and that the grantee of a bill of sale on the goods was protected (a).

(3) Fraudulent removal

The question whether a removal is fraudulent or not is a question of fact (b).

It would seem that, if a bill of sale comprises articles likely to be destroyed or injured by removal, an unqualified covenant not to remove the chattels without the consent of the grantee may be deemed a covenant "necessary for the maintenance of the security" within clause (1) of this section, so as, on breach thereof, to give the grantee a right to seize the chattels (c).

Goods can only be seized under a bill of sale on the ground of failure to produce receipts, if such failure is without reasonable excuse (d).

(4) Non-production of receipts for rent, &c.

Where rent has been due only a few days, and the landlord has not yet required payment, this is a reasonable excuse for non-production of the last receipt (e).

(5) Execution

Where a judgment debtor after seizure under an execution of goods claimed by the holder of a bill of sale, and after an interpleader order had been made, filed a liquidation petition, it was held that the trustee in the liquidation was entitled to the goods subject to the claim of the bill of sale holder (f).

But where an interpleader order is made, a claimant under a bill of sale is not entitled to demand from the sheriff any sum not included in the particulars of claim (g).

As to the meaning of the word "judgment," see the cases cited below (h).

Proviso as to restraining grantee from seizing goods

The powers of the Court under this proviso are discretionary (i), but will not generally be exercised except on the grantor bringing into Court the amount claimed by the grantee (k);

(c) 38 & 39 Vict c 55

(a) *Wimbledon Local Board v Underwood*, (1892) 1 Q B 836

(b) *John v Jenkins*, 1 Cr & M 227

(c) *Fisher v Cobb*, 18 Q B D at pp 503, 504, *Seed v Bradley*, (1894) 1 Q B 319, C A, *Exp Payne, Re Cotton*, 56 L T 571, *Re Paxton, Exp Pope*, 60 L T 428

(d) *Weardale Coal and Iron Co v Hodson*, (1894) 1 Q B 598, C A

(e) *Exp Cotton*, 11 Q B D 301

(f) *Exp Halling, Re Haydon*, 7 Ch D 157, C A

(g) *Hockey v Evans*, 18 Q B D 390, C A

(h) Judicature Act, 1873 (37 & 38 Vict c 66), s 100, R S C 1883, Ord XLII, rr 17, 24. But see *Cremetti v. Crom*, 4 Q B D 225, *Exp Schmitz, Re Cohen*, 12 Q B D 509.

(i) *Exp Cotton*, 11 Q B D 301, *Hukson v Dalow*, 23 Ch D 690.

(k) *Hill v Knkwood*, 42 L T 105

unless, in the opinion of the Court, the grantee is acting unreasonably (*l*).

So it would seem that, if the seizure is on the ground of fraudulent removal of the goods, they must be replaced on the premises, so that the cause of seizure may no longer exist, before the grantor can seek relief (*l*).

The application for an injunction should be by summons, supported by an affidavit of the facts; but the Court will not grant even an interim injunction unless the facts raise a *prima facie* inference that the cause of seizure no longer exists (*m*); and an interim injunction will only be granted until a day fixed (*m*).

By sect 13 of the Act of 1882 it is enacted, that—

“All personal chattels seized, or of which possession has been taken after the commencement of this Act, under or by virtue of any bill of sale (whether registered before or after the commencement of this Act), shall remain on the premises where they were so seized or so taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were so seized or taken possession of”

When chattels may be removed or sold

Where the holder of a bill of sale seized the chattels and, with the consent of the grantor, removed them within five days after seizure with a view to preventing the landlord distraining upon them, it was held that the landlord had no cause of action under this section for the removal of the goods, and that, inasmuch as the goods were the property of the holder of the bill of sale and not of the grantor, an action for double value under 11 Geo. II. c. 17, s. 3, would not lie for a removal (*n*).

Removal to prevent distress.

Where a horse and cab, which were comprised in a bill of sale, were seized by a grantee in a public street and taken by him to his own yard where he kept them for five days, it was held that the grantee had reasonably complied with the requirements of this section, and that the grantor could not recover damages for wrongful seizure (*o*).

Goods seized in public highway

After the expiration of the five days the grantor cannot maintain trespass for removal of the goods, for he has no longer the present possession, actual or constructive, nor any legal right to

Rights of grantor after removal.

(*l*) *Hickson v Darlow*, 23 Q. B. D. 690. *Corp*, 24 Q. B. D. 135, C. A. See *Lane v Tyler*, 56 L. J. Q. B. 461.

(*m*) *Payne v Fern*, 6 Q. B. D. 620.

(*n*) *Tomlinson v. Consolidated Credit*

(*o*) *O'Neill v City Finance Co.*, 17 Q. B. D. 234.

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possession, but, until the goods are actually sold, he still has an equitable right to redeem them, and may claim damages for any injury done to the goods in removing them (p).

41 & 42 Vict
c 31, s 8

xi.—Statement of Consideration—By sect. 8 of the Act of 1878, it was provided that every bill of sale should set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against trustees or assignees in bankruptcy or liquidation, or under any creditor's trust deed, and as against execution creditors, should be deemed fraudulent and void

Repeal

This section was repealed by sect 15 of the Act of 1882, so far as relates to bills of sale given by way of security executed since the commencement of the repealing Act, but not so as to affect the validity of anything done or suffered before that date (q)

45 & 46 Vict
c. 43, s 8

By sect 8 of the Act of 1882, it is provided that every bill of sale "shall truly set forth the consideration for which it was given; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein."

Distinction
between
effects of
these enact-
ments

The effect of the two enactments is different. Under the former Act, the effect was to avoid a bill of sale which untruly stated the consideration only as against the persons specified in sect. 8 of that Act, but to leave it valid and binding as between grantor and grantee; but under the present enactment such a bill is absolutely void even as between parties themselves in respect of the personal chattels comprised therein.

Misstatement
of considera-
tion

Under sect. 8 of the Act of 1878, it has been repeatedly held that, if the consideration be not truly stated, the bill of sale, however honest, will be void (r).

The deed was held void in the following cases—

Where the consideration was stated to be 120*l*, when really 30*l*. was for interest and expenses, though the attestation clause was followed by a receipt which stated the consideration correctly. Something was kept back for interest which could not be due, and the receipt was not part of the deed (s).

Where 700*l*. was the consideration stated, but 7*l*. 10*s*. was

(p) *Johnson v Diprose*, (1893) 1 Q B 512, C A

(q) 1st November, 1882 As to the extent of the repeal, see *Swift v Pannell*, 24 Ch D 210, *Hall v. Smith*, W N (1887) 170, *Exp Isaac, Re Chapple*. 23 Ch. D 409 C A.

(r) *Exp Carter*, 12 Ch D 908, *Exp Nat Merc Bank, Re Haynes*, 15 Ch D 42, C A, *Exp Ord*, W N (1881) 30, C. A.

(s) *Exp. Charing Cross Bank, Re Parker*, 16 Ch D 35, C A

retained for commission on the loan and expenses, and not stated (*t*). CHAPTER XIV

Where part of the consideration was money to be paid at a future day to the landlord for rent not due at the date of the deed, but not stated (*u*):

Where the alleged consideration was "312*l.* now owing," but in fact 126*l.*, part of that amount, represented the liability of the grantee in respect of certain current bills accepted by him for the accommodation of the grantor, which were, in fact, afterwards paid by the grantee pursuant to arrangement (*w*):

Where the consideration money was stated to be "now paid," but part of the advance consisted of bills of exchange payable twelve months after date (*x*); so also where part was retained by the grantee to meet running acceptances and to defray certain agreed expenses (*y*).

On the other hand, it is sufficient if the consideration is honestly and substantially stated, so as to show the true nature of the transaction (*z*). What statement is sufficient

A mere clerical error or slight inaccuracy in the statement will not avoid a bill of sale which is in other respects in conformity with the Acts (*a*), if it sufficiently appears from the deed what the consideration really was (*b*).

A statement that the consideration was "32*l.* or thereabouts," was held to be sufficient (*c*).

The consideration may be stated to be partly made up of the charges of the grantee's solicitor for preparing the bill (*d*).

A solicitor acting for both grantor and grantee may, with the consent of the grantor, retain part of the consideration for costs of and incident to the transaction without that fact being mentioned in the bill (*e*).

So, the grantor may hand back to the grantee part of the

(*t*) *Hamilton v Chawnc*, 7 Q B D 319, C A. See *Exp Firth, Re Cowburn*, 19 Ch. D 419, C. A., *Exp. Chalknoi, Re Rogers*, 16 Ch D 260, C A.

(*u*) *Exp Rolph, Re Spindler*, 19 Ch D. 98, C A.

(*w*) *Mayer v Mindelovich*, 59 L T. 400. See *Darlow v Bland*, (1897) 1

2 B. 125.

(*x*) *Re Moon*, *Exp Off. Rec.*, 4 Mans 51.

(*y*) *Richardson v Harris*, 22 Q B D

268, C A.

(*z*) *Roberts v Roberts*, 13 Q B D. 794, C A.

(*a*) *Exp Winter, Re Fothergill*, 44 L T 323, 29 W R 575, C. A.

(*b*) *Roberts v Roberts*, *supra*; *Collis v Tuson*, 46 L T 387.

(*c*) *Hughes v Little*, 18 Q. B. D. 32, C A.

(*d*) *Cohen v Higgins*, 8 T L R 8.

(*e*) *Exp Hunt, Re Cann*, 13 Q B D. 36. See *Hamlyn v. Betteley*, 5 C P.

D 327

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Meaning of
"considera-
tion"

consideration in respect of a debt then due or to accrue due (*f*). But not so if the grantor hands back money under pressure (*g*).

A collateral agreement for the application of the money need not be stated, nor are recitals of the object and motive required (*h*).

The word "consideration" means that which is in law the consideration for the giving of the instrument, not the sum secured by it (*i*). The consideration was held to be truly stated to be money lent, though it was a balance due on a statement of account (*l*). So, where the consideration was stated to be 400*l* paid, although 200*l*. of it had been paid a few days before (*l*).

So, where a bill of sale purported to be given in consideration of "1,500*l* now paid," but in fact the amount had been previously advanced and paid to the grantor on the security of a bill which was discovered, before registration, not to be in conformity with the Bills of Sale Acts, and which was accordingly cancelled, the consideration for the bill was held to be truly stated (*m*).

An agreement not to register, whereby the bonus was increased, is no part of the consideration, nor is it a condition or defeasance (*n*).

In a bill of sale given by a purchaser to a vendor to secure the balance of purchase-money, the statement of the consideration as cash paid was held sufficient (*o*). A bill of sale stated the consideration to be in order to induce the grantee not to institute proceedings against him. No proceedings had been threatened; the consideration was held to be sufficiently stated (*p*). So, where the consideration was stated to be in part a covenant by the grantees, and no such covenant was contained in the bill of sale (*q*).

Bill of sale
under 30*l*. to
be void.

By sect. 12 of the Act of 1882, "every bill of sale made or given in consideration of any sum under 30*l* shall be void"

(*f*) *Richardson v Harris*, 22 Q. B. D. 268, C. A., *Cochrane v Dixon*, 3 T. L. R. 717

(*g*) *Bishop v Consolidated Credit Corporation*, L. T. J. (1886), p. 426

(*h*) *Exp National Mercantile Bank, Re Haynes*, 15 Ch. D. 42, C. A. See *Hamlyn v Betteley*, 5 C. P. D. 327, *Thomas v. Searles*, (1891) 2 Q. B. 408, C. A.

(*i*) *Exp. Challinor, Re Rogers*, 16 Ch. D. 260, C. A.

(*k*) *Credit Co. v. Pott*, 6 Q. B. D. 73, C. A.

(*l*) *Exp Johnson, Re Chapman*, 26 Ch. D. 338

(*m*) *Exp Allam, Re Munday*, 14 Q. B. D. 43. See *Exp. Nelson, Re Hockaday*, W. N. (1887) 7, C. A.

(*n*) *Exp Popplewell, Re Storey*, 21 Ch. D. 73, C. A.

(*o*) *Exp Bolland, Re Roper*, 21 Ch. D. 543, C. A.

(*p*) *Re Fothergill*, 29 W. R. 575, C. A.

(*q*) *Roberts v. Roberts*, 13 Q. B. D. 794, C. A.

F.
W.
Chap.

xii.—Form of Bill of Sale under the Act of 1882 —By sect 9 of this Act it is enacted that—

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“A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed.”

Form of bill of sale.

Although this section does not make imperative a literal conformity with the statutable form, it enacts not only what a bill of sale must contain, but also what it must not contain, and renders void any bill which departs from the form in any material and substantial particular (i) The result is, that all bills of sale given as security for money are prohibited to which the statutable form is inappropriate (s) And, accordingly, licences to seize goods, inventions, receipts, powers of attorney, and other instruments falling within the definition of a “bill of sale” given by sect. 4 of the Act of 1878 (t), but incapable from their nature of being framed so as to be “in accordance with” the statutable form, are no longer available as securities for money (u) If a bill of sale is not in accordance with the statutable form, the defect cannot be remedied by statements in the affidavit filed on the registration, or by other evidence (x)

Bills of sale not in accordance with statutable form avoided.

It makes no difference whether the money sought to be secured is payable by the grantor in respect of a loan or of any other transaction; as, for instance, where a bill of sale is given to secure any moneys which the grantee may be called on to pay in respect of a guarantee given at the request of the grantor (y).

Bill of sale by way of indemnity to surety

A bill of sale which does not conform to the requirements of this section is void as against all persons, including the grantor himself (z). It is also void and altogether inoperative, not merely as regards the personal chattels comprised therein, but as to every part thereof, so that a covenant contained in it for payment of principal and interest thereon intended to be secured upon the chattels is also rendered void (a).

Extent of avoidance.

(i) *Thomas v Kelly*, 13 App Cas 506 See also *Exp Stanford, Re Barber*, 17 Q B D 259, C A., *Kelly v. Kellond*, 20 Q B D 569, C A

(s) *Thomas v Kelly*, *sup* at p 511, *per* Lord Halsbury, C

(t) See *ante*, p 201

(u) *Exp Parsons, Re Townsend*, 16 Q B D 532, C A.

(x) *Bud v Davey*, (1891) 1 Q. B 29,

at p. 31, C A.

(y) *Hughes v Little*, 18 Q B D 32, C A., *Re Hill, Exp Off Rec*, 2 Mans. 208

(z) *Thomas v Kelly*, 13 App Cas at p 511

(a) *Davies v. Rees*, 17 Q B D 408, C A., at p 412, *per* Bowen, L J. See *Griffin v Union Deposit Bank*, 3 T. L. R 608.

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Severance of security

A single deed may contain distinct and severable contracts or obligations; if so, it may be valid as a security so far as relates to land or other property not being "personal chattels" within the meaning of the Bills of Sale Acts, though non-conformity with the statutable form will render it void so far as regards any part of the instrument which appears as an integral part of a bill of sale in the schedule form (b)

Effect of inclusion in same mortgage of personal chattels and other property

Whether the inclusion in a single deed of such other property with personal chattels will of itself constitute a departure from the statutable form, so as to avoid the security as to the personal chattels, does not appear to have been expressly decided. It is conceived that such would be the result, even if the assignments of the several kinds of property be kept separate and distinct, on the ground that such inclusion would tend to render the deed less simple and intelligible, and to materially alter the legal effect of the instrument. It has been held that if personal chattels and other property are comprised in a single assignment, and scheduled together, that of itself constitutes a departure from the statutable form of a bill of sale, which will vitiate the instrument as regards the personal chattels (c)

Description of parties

The form requires the names and addresses of the grantor and grantee respectively to be stated, but does not require the parties to be otherwise particularly described. Ambiguity of description of the grantee, if capable of ascertainment without the aid of extrinsic evidence, will not avoid a bill of sale (d)

Misdescription of grantor's name

Indeed, in one case it was held that a bill of sale was valid where the grantor's christian name was misstated in a bill of sale which was executed by him under such false name for the purpose of concealing the fact that he had given a bill of sale (e)

Trustee for grantee company

It was held, under the Bills of Sale Act, 1854, that a bill of sale might be taken in the name of a trustee for the person who actually advanced the money, though the trust did not appear on the face of the instrument (f).

(b) *Re Burdett, Exp Byrnes*, 20 Q B D 310, C A. See also *Re O'Dwyer*, 19 L R Ir 19, *Stevens v Munton*, 39 W R 129, C A, *Re Bانشا, &c Co*, 21 L R Ir 181

(c) *Cochrane v Entwistle*, 25 Q B D 116, C A

(d) *Simmons v Woodward*, (1892) A. C 100, *Doleen v Doleen*, (1895) 1 Q B. 898

(e) *Downes v. Salmon*, 20 Q B D 776. See *Exp M'Hattie, Re Wood*, 10 Ch. D 398 C A. *Central Bank of*

London v Hawkins, 60 L T 901. And see *post*, p 247. A deed will not, generally, be invalidated by reason of its being executed by a party under an assumed name, no fraud being intended. See *Leigh v Leigh*, 15 Ves 100, 10 R R 31, *Davies v Lowndes*, 2 Sc 103, *Doe v Yates*, 5 B & Al 544, *Re Matthews*, 16 Beav 245, *Re James*, 5 Exch 310, *Re Dearden*, 5 Exch 740

(f) *Robinson v. Collingwood*, 17 C B N S 777

A bill of sale may be given or taken in the incorporated name of a company (g). CHAPTER XIV.

Though the payment of a single debt may apparently be secured to several persons jointly by a bill of sale (h), yet an attempt to secure several distinct sums payable to separate creditors by one bill of sale will invalidate the instrument (i). Several mortgagees.

The statutable form does not contain any recitals or expressly permit their insertion in a bill of sale. But recitals may be inserted, if necessary, to explain the nature of the transaction or the intention of the parties (l). Recitals

Undue prolixity of recitals may of itself vitiate a bill of sale for securing payment of money, as involving a departure from the "simplicity" of the statutable form (l).

Sect. 9 of the Act of 1882 deals only with the form of the instrument, and though the statutable form prescribes that the consideration shall be stated, an untrue statement thereof does not constitute a deviation from the form, so as wholly to invalidate the instrument on that ground; it will, however, be void "in respect of the personal chattels comprised therein" by virtue of sect 8 of the same Act (m). Consideration

By sect. 12 of the same Act, every bill of sale made or given in consideration of any sum under 30*l.* shall be void (n).

The introduction into the assignment of the words "as beneficial owner" will avoid a bill of sale, as being an attempt to incorporate, by virtue of sect. 7, para (c), of the Conveyancing, &c Act, 1881, the covenant for immediate possession by the grantee on default and quiet enjoyment thereafter contained in that section, and thereby to alter the legal rights of the parties from the rights which the form gives, having regard to the provisions of sect. 13 of the Bills of Sale Act, 1882 (o). Assignment

The statutable form requires a present assignment of specific chattels to be described in the schedule annexed to the bill of sale, and to be registered therewith (p). Description of chattels assigned

(g) *Re Cunningham & Co., Attorneys' Case*, 28 Ch D 682 See *Shears v Jacob*, L R 1 C P 513
(h) *Maughan v Sharpe*, 17 C B N S 443

(i) *Melville v Stranger*, 13 Q B D 392, C. A. But see *Re Smith, Exp. Tarbuch*, 72 L T 59

(l) *Roberts v Roberts*, 13 Q B D. 794, C. A., *Exp Stanford, Re Barber*, 17 Q B D at pp 269, 270, per Bowen, L J

(l) *Exp Stanford, Re Barber*, 17 Q B D 259, C. A., at p 274, per Fry, L J.

(m) *Heseltine v. Summons*, (1892) 2 Q B 547, C. A. See sect 8 of the Act of 1882, ante, p. 226

(n) See *Davis v. Usher*, 12 Q B D. 490

(o) *Exp Stanford, Re Barber, supra*
(p) Sect 10, sub-s 2, of Act of 1878, post, p 243

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Specific description means description with such particularity as is used in a business inventory of chattels (*q*)

If the specific description of the chattels contained in such schedule is sufficient for identification of the chattels, reference in the schedule to an unregistered catalogue will not restrict the description so as to avoid the bill (*i*)

The omission to state in the schedule the place where the chattels are located has been held not to vitiate the bill (*s*)

An attempt to include in the assignment after-acquired chattels, additional to (*t*), or substitutional for (*u*), specific chattels assigned, will vitiate the bill

The question as to including in the assignment other property not being "personal chattels" has been already noticed (*x*).

The insertion of the words "by way of security" amongst the operative words of assignment is apparently not essential (*y*)

Statement of sum secured

The principal amount secured must be stated as a definite sum to be payable at a definite time, and consequently a bill of sale cannot be made to cover further advances of an uncertain amount which may or may not be made (*z*). So a bill of sale cannot be given by way of indemnity against liability on a guarantee under which no sum may ever become payable, or if the amount payable and the time at which the liability will commence and require to be satisfied are uncertain (*a*).

Interest

The rate of interest may be such as agreed upon between the parties, however high, and even unreasonable (*b*), but it must be rateable, and calculated up to the time when the principal is to be called in (*c*). And, consequently, an attempt to make a bill of sale secure capitalized interest will vitiate the bill (*d*).

The rate of interest chargeable on the loan must be specified (*e*). But the statutable form does not restrict the rate of

(*q*) *Carpenter v Deen*, 23 Q B D. 566, C A

(*i*) *Davidson v Carlton Bank*, (1893) 1 Q B 82, C A

(*s*) *Exp Hill, Re Lane*, 17 Q B D 74

(*t*) *Thomas v Kelly*, 13 App Cas 506, overruling on this point *Roberts v Roberts*, 13 Q B D 794, C A. *Crosby v Mazoull*, W N (1885) 95, C A

(*u*) *Hadden v Oppenheim*, 60 L T 462, Q B D See *Lery v Polack*, W N (1885) 76, Q B D

(*x*) *Ante*, p 230

(*y*) *Roberts v Roberts*, 13 Q B D.

794, C A

(*z*) *Cook v Taylor*, 3 T L R 800

(*a*) *Hughes v Little*, 13 Q B D 32, C A. *Re Hill, Exp Off Rec*, 2 Mans. 208

(*b*) *Exp Stanford, Re Barber*, 17 Q B D 259, C A See at p 263, *per* Lord Esher, M R

(*c*) *Davis v Burton*, 11 Q B D. 537, C A. See *Haslewood v Consolidated Credit Co*, 25 Q B D 555, C A

(*d*) *Davis v Burton*, *supra*

(*e*) *Blankenstein v Robertson*, 24 Q B D. 543 But see *Wilson v Kirkwood*, W. N (1883) 40.

interest to a rate per cent. or per annum, and the rate may be specified as "one shilling in the pound per month," or otherwise as agreed (f) The statement of a lump sum as payable for interest is not sufficient compliance with the form (g).

It would seem doubtful whether a provision for the payment of a bonus can be included in the security of a bill of sale; at all events a bill will be void, unless the amount sought to be made payable by way of bonus is distinctly specified as such (h).

The principal and interest are to be repayable by instalments Indeed, it has been said that the interest is an essential part of the instalments made payable according to the form so as to give effect to a bill of sale, and that the instalments must comprehend not only the principal sum but the interest (i) But the equality of instalments is merely directory, not obligatory, and a bill of sale may be valid although the sum lent, together with interest, is made payable at specified times by unequal instalments (j).

So, also, it is sufficient if a bill of sale provides for payment of principal and interest by equal instalments "until the whole shall be paid," the first payment to be made on a specified date, as the number of instalments and the time for payment of the last instalment can be ascertained by calculation (k) And a bill of sale will not be avoided because the principal and interest cannot be exactly paid by instalments of the amounts specified (l).

Certainty in the time of payment is essential So a bill of sale will be invalid if it contains a covenant to pay the sum advanced and interest on demand (m), or within a specified time after demand (n), even though it be provided that such demand shall not be made before a specified time (o) The absence of a covenant for payment vitiates a bill of sale (p)

Bonus

Instalments.

Covenant for payment of principal and interest.

(f) *Lumley v. Simmons*, 34 Ch D 698, C A

(g) *Blankenstein v. Robertson*, 24 Q B D 543 See *Myers v. Elliott*, 16 Q B D 526, C A, *Exp. Abraham, Re Johnstone*, 50 L T 184, *Macey v. Gilbert*, W N (1888) 111.

(h) *Davis v. Burton*, 11 Q B D 537, C A., *Myers v. Elliott*, *sup.*, *Re Williams, Exp. Pearce*, 25 Ch D 656; *Simmons v. Woodward*, (1892) A. C. 100

(i) *Per Lord Halsbury in Simmons v. Woodward*, (1892) A. C. 100, at p 107

(j) *Goldstrom v. Tallenman*, 18 Q B. D. 1, C A., *Re Cleaver, Exp. Raw-*

lugs, 18 Q B D 489 See *Simmons v. Woodward*, *sup.*

(k) *Re Bagen, Exp. Hasluch*, (1894) 1 Q B 444 See *Edwards v. Maiston*, (1891) 1 Q B 225, C A

(l) *Lynfoot v. Pochett*, (1895) 2 Ch. 835, C A

(m) *Hetherington v. Groome*, 13 Q B. D 789, C A., *Sibley v. Higgs*, 15 Q B D 619, *Mackay v. Morrill*, 34 W. R 433

(n) *Bishop v. Beale*, 1 T L R 140; *Clewson v. Townsend*, 1 C & E 418

(o) *Sibley v. Higgs*, 15 Q B D 619.

(p) *Re Moore, Exp. Off. Rec.*, 4 Mans.

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It has been held that the time for payment may be fixed by reference to the happening of a specified event (q).

But the time must be stated with reference to an event which may never happen (r).

There is no objection to a stipulation that, in case of default of payment of an instalment of principal and interest, the whole of the debt shall forthwith become payable (s).

It is not necessary that the principal and interest should be made payable together. The payment of principal may be postponed until the interest has been paid (t), and *vice versa* (u).

Where a bill of sale contained a covenant to pay the amount by equal yearly instalments, and also a covenant to pay interest on "the said sum" at a specified rate quarterly, it was held, that the covenant as to payment of interest referred to the amount of principal owing for the time being after some of the instalments had been paid, and, consequently, that the bill of sale was in accordance with the statutory form (x).

The principal, with rateable interest, may be made payable in a single sum on a fixed date instead of by instalments, with (y) or without (z) a proviso that, if the grantor should not break any of the covenants nor become bankrupt, and should pay the principal and interest by equal monthly instalments on specified days, the grantee should accept payment by such instalments.

So, the principal may be made payable by specified instalments together with rateable interest on the instalments for the time being remaining unpaid (a).

Maintenance
and de-
feasance of
the security

The statutable form permits the insertion of terms "as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security" Such terms must be such as are necessary for the purposes referred to, in order to be enforceable by seizure of the goods under sect 7 of the Act of 1882. Agreement between the parties will not make a stipulation "necessary" if it is not so (b).

(q) *Grannell v Monck*, 24 L R Ir 241, *Branch v Offord*, 17 Q B D 484, at p 487, *per* Bowen, L J

(r) *Hughes v Little*, 18 Q B D 32, C A

(s) *Exp Cockrane, Re Sendall*, 26 W R 818, *Lumley v Simmons*, 34 Ch D 698, C A

(t) *Edwards v Marston*, (1891) 1 Q B D 225, C A

(u) *Goldstrom v Tullerman*, 18 Q B D 1, C A, *Re Cleaver, Exp Raw-*

lings, 18 Q B D 489, C A

(x) *Wearside Coal and Iron Co v Hodson*, (1894) 1 Q B 598, C A

(y) *Watkins v Evans*, 18 Q B D 386, C A

(z) *Exp Payne, Re Cooke*, 56 L T 571, 35 W R 476 See *Re Cleaver, Exp Rawlings*, 18 Q B D 489, C A.

(a) *Hastlewood v Consolidated Credit Co*, 25 Q B D 555, C A.

(b) *Furber v Cobb*, 18 Q B D 494, C A.

Covenants for payment of insurance premiums and production to the grantee of receipts for the same, are covenants "necessary for the maintenance of the security" and valid (c). And it may be stipulated that, on the grantor's default, the grantee may insure, and that premiums paid by him with interest shall be repayable on demand, and until repaid shall be a charge on the property (d).

Where a bill of sale, given to secure money advanced by several creditors of a trader, contained stipulations that he should not during the continuance of the security obtain credit above a specified amount from any persons, except those creditors, without their consent, and that he would give them the greater part of his business, and keep proper books of account, and permit the grantees or their agent to inspect them it was held, that the insertion of these stipulations avoided the bill of sale as not in accordance with the statutable form (e).

A covenant to pay rent, rates, taxes, &c, and to produce receipts, is good (f). And it may be stipulated that, on the grantor's default, the grantee may make such payments to be repayable to him with interest on demand, and to be a charge on the property until repaid (g). Rent, taxes, &c

Bills of sale have been upheld containing agreements to replace, or keep in repair, chattels which should become worn out, destroyed, injured, or deteriorated (h); and that, on the grantor's default so to do, the grantee might replace or repair the chattels, and that moneys expended by him for such purposes should be repayable to him, on demand with interest, and be a charge on the property till repaid (i). Repairs, &c

Such stipulations as above referred to for securing to the grantee the repayment of moneys expended by him, though they may be inserted by agreement between the parties, are not "necessary for the maintenance of the security" within the meaning of sect 7 of the Act of 1882; they are accordingly enforceable by action on the covenant, and will have their effect when a foreclosure or redemption comes to be worked out; but

(c) *Duff v Valentine*, W N (1883) 225, *Hammond v Hooking*, 12 Q B D 291, *Watkins v Evans*, 18 Q. B D 386, C A

(d) *Exp Stanford, Re Barber*, 17 Q B D 259, C A, *Briggs v Pike*, 61 L J Q B 418

(e) *Peace v Brookes*, (1895) 2 Q B 451

(f) *Turner v Culpan*, 58 L T. 340

(g) *Goldstern v. Tallerman*, 18 Q B. D 1, C A

(h) *Consolidated Credit Corporation v. Gosney*, 16 Q B D 24, *Furber v Cobb*, 18 Q B D. 494, C A, *Sead v Bradley*, (1894) 1 Q B 319, C A

(i) *Topley v Crosbie*, 20 Q B D 350.

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any attempt to extend to a breach of such stipulations the power of seizure given by that section will be fatal to a bill of sale (*h*).

An unqualified covenant not to remove the chattels from the premises without the consent of the grantee is good (*i*). And it would seem that such a covenant, as well as a covenant to produce receipts for rent, taxes, &c., are to be deemed covenants necessary for the maintenance of the security, so that a breach of such covenants will render the chattels assigned liable to seizure under sect. 7 of the Act of 1882 (*m*).

Covenants
for title.

It has been seen that the grantor must not be made to convey "as beneficial owner," thereby attempting to import into a bill of sale the full statutory covenants for title, including the covenant for immediate possession by the grantee on default, and quiet enjoyment thereafter (*n*). But it has been held that an express covenant for further assurance at the cost of the grantor, in the usual form, binding the grantor and all persons claiming through or under him, was a covenant "for the maintenance of the security," and consequently free from objection (*o*).

Powers of
seizure and
sale.

The events, upon the happening of which the chattels assigned by a bill of sale are liable to be seized or taken possession of by the grantee, have been already considered (*p*).

Upon the happening of any of these events, and after reasonable notice to the grantor, the grantee of a valid bill of sale may, though the bill contains no express power of seizure or sale, seize and take possession of the chattels, and after the expiration of five clear days thereafter remove and sell them, subject to the grantor's right to redeem them at any time before actual sale (*q*).

It seems to be settled, after some difference of judicial opinion (*q*), that the statutory powers of the Conveyancing Act, 1881, ss 19—21, as to powers of sale, are not incorporated into the statutable form of a bill of sale given by the Bills of Sale Act, 1882 (*r*).

There is no objection to the insertion in a bill of sale of an

(*h*) *Braneh v Offord*, 17 Q. B. D. 484, Bowen, L. J., *Real and Personal Advance Co v Cleais*, 20 Q. B. D. 304, C. A.

(*i*) See *ante*, p. 224.

(*m*) *Furber v Cobb*, 18 Q. B. D. 494, C. A., at pp. 505, 506.

(*n*) See *ante*, p. 220.

(*o*) *Re Cleaver, Ex p Rawlings*, 18 Q. B. D. 489, C. A.

(*p*) Sect. 7 of the Act of 1882, *ante*, p. 220.

(*q*) *Ex p Official Receiver, Re Morritt*, 18 Q. B. D. 222, C. A., *Watkins v Evans*, 18 Q. B. D. 386, C. A.

(*r*) *Calvert v Thomas*, 19 Q. B. D.

express power to seize and sell the assigned chattels, provided that the terms of the power are not calculated to mislead the grantor or to alter the legal rights of the parties (s).

An express power may be given to the grantee to "sell the goods by private treaty or public auction on or off the premises" (t).

A power to sell on default in payment "on demand" (u), or within a specified time after demand (v), is bad.

The following provisions contained in express powers of seizure and sale have been held to vitiate bills of sale—

That the power should be exerciseable "if the mortgagor should take the benefit of any Bankruptcy Act," as conferring a power to seize in the event of the mortgagor effecting a composition under the Bankruptcy Act, 1883 (x).

That the grantee might have the goods valued, and purchase them at such valuation (y).

That the purchaser should not be bound to see or inquire whether any default had occurred in payment of the sums secured (z).

That after payment of the sums secured, the bill of sale and other documents relating to the loan should remain in the custody and be the property of the grantee (a).

That the grantee may retain out of the proceeds of sale his commission as auctioneer, as though he were selling on behalf of the grantor (b); or "the expenses attending such sale, or otherwise incurred in relation to the security" (c); or all expenses to which the grantor "might be put" (d). But the power may provide that the grantee may retain the costs of entry, of discharging distresses, executions, or incumbrances, of seizure, keeping possession, removal, warehousing, and sale (e).

Power to seize forcibly will not avoid a bill of sale (f).

The omission from a bill of sale of any reference to the proviso given in the statutable form that the goods shall not be

Proviso
limiting right
of seizure

(s) *Exp Official Receiver, Re Morritt*, 18 Q B D 222, C A, *Briggs v Pike*, 61 L J Q B 418, 66 L T 637.

(t) *Bourne v Will*, 64 L T 530.

(u) *Hetherington v. Groome*, 13 Q B 789, C A.

(v) *Stibley v Higgs*, 15 Q B D. 619.

(x) *Gilroy v Bowery*, 59 L T 223.

(y) *Lyon v Morris*, 19 Q B D 139, C A.

(z) *Blairberg v Beckett*, 18 Q B D 96, C A, following *Blairberg v Parsons*, 17 Q B D 336.

(a) *Watson v Strickland*, 19 Q B D 391, C A.

(b) *Furber v Cobb*, 18 Q B D. 494, C A.

(c) *Calvert v Thomas*, 19 Q B D 204, C A.

(d) *Macey v Gilbert*, W. N (1888) 111.

(e) *Exp Official Receiver, Re Morritt*, 18 Q B D 222, C A, *Lumley v Simmons*, 34 Ch D 693, C A.

(f) *Ibid*.

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liable to seizure for any cause other than those specified in sect 7 of the Act of 1882, would apparently vitiate the bill (*g*).

But the statutable proviso need not be inserted in so many words, if the effect of the words used is substantially the same (*h*).

The insertion of the proviso will not render a bill of sale valid, if the bill contains other provisions which are inconsistent with the provisions of the Bills of Sale Acts (*i*).

Attestation
clause

A bill of sale will be void as not in accordance with the statutable form, if it does not state not only the name and address, but also the correct description of the occupation or style of the attesting witness (*j*).

xiii.—Defeasances, Conditions, and Declarations of Trust —
Sect. 10, sub-s. (3), of the Act of 1878, enacts as follows :—

Defeasance,
condition or
declaration of
trust to be
deemed part
of bill of
sale

“If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void.”

Meaning of
“defea-
sance”

A defeasance is a collateral deed made at the same time as the grant, containing certain conditions, upon the performance of which the estate created by such grant may be defeated. It differs from a condition in this respect, that a condition is inserted in the deed by which the estate is created. A defeasance is a separate deed executed at the same time (*k*).

Where a bill of sale and a mortgage of certain reversionary interests were given on the same day to secure the same debt, and by the bill of sale simple interest was made payable by instalments, but by the mortgage compound interest was made payable by instalments on the same day as those mentioned in the bill of sale, it was held, that the condition in the mortgage operated as a defeasance of the bill of sale within sub-s (3) of sect. 10, and that the registration of the bill was consequently void (*l*).

So the giving of a bill of exchange, promissory note, or other

(*g*) *Thomas v Kelly*, 13 App Cas. 506, at p 519, *per* Lord Macnaghten

(*h*) *Exp Allam, Re Munday*, 14 Q B D 43, *Cartwright v Regan*, (1895) 1 Q B 900

(*i*) *Re Williams, Exp Pearce*, 25 Ch. D 656. See *Barr v Kingsford*, 56 L. T. 861.

(*j*) *Stims v Trollope*, (1897) 1 Q B 24, C A. As to description, see *post*, p 248

(*k*) *Crumse, Digest*, tit xxxii. c. vii. s 25

(*l*) *Eduards v. Marcus*, (1894) 1 Q B. 587. See *Ellis v. Wright*, 76 L. T. 522.

instrument by way of collateral security for a debt secured by a bill of sale, will operate as a defeasance and vitiate the registration if such collateral instrument is in any respect inconsistent with the provisions of the Bills of Sale Acts, or with the terms of the particular bill, or in any way tends to alter the rights of the parties (*m*).

But a promissory note so given is not of itself avoided (*n*).

Similarly, all the covenants and conditions of the contract must be set out in the bill of sale itself or on the same paper as the bill, and not incorporated by reference to another instrument specifically (*o*), or to other instruments generally (*p*). Nor will the omission of such reference save from avoidance a bill, though framed in strict accordance with the statutable form, if the evidence shows that the bill is dependent for its real effect on some other instrument (*q*).

Conditions

A collateral agreement as to the application of the consideration money is not necessarily a defeasance, condition, or declaration of trust within the meaning of this enactment (*r*).

A parol agreement for payment of the debt by instalments must be inserted in the bill of sale (*s*); but a memorandum explaining a charge in the bill of sale for bonus and interest, is not within the Acts (*t*).

Nor a collateral agreement that the grantee shall, in the first place, resort for payment to securities other than the bill of sale (*u*).

Nor an agreement not to register in consideration of a bonus (*x*). The agreement in the case referred to was by parol; and it would seem that a parol agreement cannot be a defeasance (*y*).

Nor the deposit with the grantee of a policy of assurance on the life of the grantor by way of collateral security (*z*).

The declaration of trust referred to in sect 2 of the Act of 1854, and sect. 10 of the Act of 1878, does not apply to a trust declared in favour of a third party; the defeasance, condition or

Declaration of trust

(*m*) *Simpson v Charing Cross Bank*, 34 W R 568, *Counsell v London and Westminster Loan and Discount Co*, 19 Q B D 512, C A., *Orm v Fisher*, 5 T L R 504.

(*n*) *Monetary Advance Co v Cater*, 20 Q B D 785

(*o*) *Lee v Baines*, 17 Q B D 77

(*p*) *Watson v Strickland*, 19 Q B D 391, C A

(*q*) *Sharp v M'Henry*, 38 Ch D 427

(*r*) *Thomas v Searles*, (1891) 2 Q B.

408, C A.

(*s*) *Exp Southam*, L R 17 Eq 578

(*t*) *Exp. Collins, Re Lees*, L. R 10 Ch A 387.

(*u*) *Heseltine v. Simmons*, (1892) 2 Q B 547, C A

(*x*) *Exp Popplewell, Re Storey*, 21 Ch. D 73, C A

(*y*) *Per Jessel*, M R., 21 Ch D at p 81

(*z*) *Carpenter v Deen*, 23 Q B D. 566, C. A

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trust must be one in favour of either the grantor or the grantee (a).

Execution by
attorney

xiv—Execution and Attestation of Bills of Sale—A bill of sale may be executed under a power of attorney, and the grantee is not necessarily excluded from being the grantor's attorney for that purpose (b)

Bill of sale
must be duly
attested.

By sect 8 of the Act of 1878 (c), it was provided that every bill of sale should be duly attested, otherwise such bill of sale, as against all trustees in bankruptcy, &c, should be deemed fraudulent and void

By sect 8 of the Act of 1882, it is provided that every bill of sale coming within that Act shall be duly attested; "otherwise such bill of sale shall be void in respect of the personal chattels comprised therein"

Meaning of
"duly
attested."

"Duly attested" means attested in accordance with the provisions of the Act and with the statutable form of a bill of sale (d)

The form in the schedule to the Act of 1882 requires the address and description of the witness attesting the execution of a bill of sale by the grantor to be given. But where a bill of sale had two separate clauses attesting the execution of the instrument by different grantors, and the same name appeared in both cases as that of the attesting witness thereto respectively, in one case giving, and in the other omitting to give, the address and description of the attesting witness, it was held that the Court might infer from a comparison of the handwriting that the same person attested both clauses, and further, that the omission to repeat the address and description was not such a departure from the statutable form as to avoid the bill of sale (e).

Attestation
by solicitor.

By sect. 10 (1) of the Act of 1878, it was provided that the execution of every bill of sale should be attested by a solicitor of the Supreme Court, and the attestation should state that before the execution of the bill of sale the effect thereof had been explained to the grantor by the attesting solicitor. But a bill of sale under the Act, although not so explained and attested, is not void as between the grantor and grantee (f).

(a) *Robinson v Collingwood*, 10 Jur N S 1080

(b) *Furnwall v Hudson*, (1893) 1 Ch. 335

(c) This section is repealed, as to bills of sale by way of security made after the commencement of the Act of 1882, see *ante*, p 226.

(d) *Parsons v Brand*, 25 Q B D. 110, C A

(e) *Burd v. Davey*, (1891) 1 Q B 29, C A

(f) *Davis v Goodman*, 5 C P D 128, C A, *Ex National Mercantile Bank, Re Haynes*, 15 Ch D. 42, *Hill v. Kirkwood*, 28 W. R. 358, C. A.

Attestation by the solicitor of the grantee is sufficient (*g*) The affidavit must prove the attestation by the solicitor (*h*). CHAPTER XIV

The attesting solicitor may be a managing clerk not practising on his own account (*i*), and it would seem that he need not hold a certificate entitling him to practise (*k*)

It has been held that the grantee of a bill of sale, although a solicitor, cannot be the attesting witness under sect 10 of the Act of 1878 (*l*), and this rule has been incorporated in sect. 10 of the Act of 1882

By the section last referred to, the above enactment as to attestation by a solicitor, and explanation to the grantee, has been repealed; and attestation by any credible witness, not being a party to the bill of sale, will suffice, so far as regards bills of sale given by way of security on or after the 1st November, 1882 (*m*) Repeal of above enactment

A bill of sale was held to be duly executed where the signature and seal of the grantor were placed at the end of a schedule annexed to the bill (*n*). Position of signature, &c

A bill of sale may be executed by attorney, and the grantee is not precluded from being such attorney (*o*). Execution by attorney

xx.—Registration of Bills of Sale—The Affidavit—By sect. 8 of the Act of 1878, it was provided that every bill of sale should be registered under that Act within seven days after the making or giving thereof, otherwise such bill of sale, as against all trustees or assignees, &c, should be deemed fraudulent and void. This section is repealed by sect 15 of the Act of 1882, but not so as to affect the validity of anything done or suffered under the former before the commencement of the later Act (*p*) Every bill of sale must be registered

By sect 8 of the Act of 1882, it is enacted as follows:—

“Every bill of sale shall be registered under the principal Act within seven clear days after the execution thereof (or if it is executed in any place out of England, then within seven clear days after the time in which it would in the ordinary course of post

(*g*) *Penwarden v Roberts*, 9 Q B D 137 See *Vernon v. Cooke*, 49 L J C P 767

(*h*) *Sharpe v. Birch*, 8 Q B D. 111
(*i*) *Hill v. Kirkwood*, 28 W. R. 358,

(*k*) *Holgate v Slighi*, 21 L J Q B 74.

(*l*) *Seal v. Claridge*, 7 Q B D 516,

(*m*) The operation of the Act of

1882 is confined to bills given by way of security See sect 3 of that Act, *ante*, p 191 See also *Casson v. Churchley*, 53 L J Q B 335.

(*n*) *Melville v. Stringer*, 12 Q B. D 132.

(*o*) *Furnival v Hudson*, (1893) 1 Ch 335

(*p*) See, as to the extent of the repeal, *ante*, p 226.

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arrive in England if posted immediately after the execution thereof),
 . . . otherwise such bill of sale shall be void in respect of the
 personal chattels comprised therein ”

The “seven clear days” within which the bill is required to be registered are to be reckoned exclusively of the day of execution. If the seventh day falls on a Sunday, or on a holiday, when the registrar’s office is not open, the registration will be valid if effected on the next following day on which the offices are open (o).

An imperfect registration does not place the assignee in a worse position than if there were none (p).

The registration on the day of the execution is complete, though the consideration was not paid nor the deed attested till after the day of the actual execution (q).

Successive
bills of sale

Under the Act of 1854, there were conflicting decisions in regard to successive bills of sale, made to avoid registration. The result would seem to be that such transactions, not being forbidden by the Legislature, were to be deemed valid as against an execution creditor (r); but in bankruptcy the successive unregistered bills of sale were not regarded with favour, and the last bill, being for a past debt, was generally treated as void (s).

Avoidance of
certain suc-
cessive bills
of sale.

A remedy is effected by sect. 9 of the Act of 1878, by which it is enacted as follows :—

“Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was *bond fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading the Act.”

Correction of
mistake.

If a mistake is made in the first registry, the bill of sale can be re-registered (t).

(o) Act of 1878, s. 22.

(p) *Banbury v White*, 2 H. & C. 300.

(q) *Darvill v. Terry*, 6 H. & N. 807.

(r) *Hollingsworth v White*, 10 W. R. 619, Q. B., *Smale v. Burr*, L. R. 8 C. P. 64, *Ramsden v. Lupton*, L. R. 9 Q. B. 17, Ex. Ch. See *Exp. Harris*, L. R. 8 Ch. A. 48.

(s) *Stansfield v. Cubitt*, 2 De G. & J. 222, 228, *Exp. Cohen*, *Re Sparke*, L. R. 7 Ch. A. 20, *Exp. Stevens*, L. R. 20 Eq. 786. But see *Re Jackson*, 4 Ch. D. 682, *Exp. Furber*, 6 Ch. D. 181. And see *Exp. Payne*, 11 Ch. D. 539, C. A.

(t) *Re O'Brien*, 10 Ir. Com. Law App. xxxiii.

A registered bill of sale, *bonâ fide* founded on a parol agreement for a bill of sale, is not a subsequent bill of sale within this section (u). The giving of a bill of sale for the purpose of confirming an earlier one supposed to be defective does not cancel the first bill if valid (x).

By sect 21 of the Act of 1878, power is given to make and alter rules for the purposes of the Bills of Sale Acts, and rules have been made accordingly (y). Power to make rules.

By sect 10, sub-s (2), of the Act of 1878, after making provision as to the execution and attestation of a bill of sale, it is enacted as follows —

“Such bill, with every schedule or inventory thereto annexed or therein referred to, and also a true copy of such bill and of every such schedule and inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, and of its due execution and attestation, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within seven clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed” Mode of registering and attesting bills of sale

By the same section it is provided that bills of sale shall rank in priority, *inter se*, according to the date of registration; the question of such priority will be discussed in a later chapter (z). Priorities of bills of sale

Where the schedule to a bill of sale described goods by numbers as per catalogue, it was held that the catalogue being referred to not in the bill itself, but only in the schedule, which was treated as distinct from the bill, did not require registration (a). The schedule

A true copy is not invalidated for clerical errors, such as the mis-spelling of a name (b), or obvious misstatement as to the date (c), or as to the amount of consideration (d), or as to the place of residence of a party (e), or the omission of a few words What is a true copy

(u) *Exp. Hauxwell*, 23 Ch D 626, 637, C A.

(x) *Cooper v. Zeffert*, 32 W. R. 402, C. A.

(y) See R S C LXII, and LXI.

(z) *Post*, Chap LVI sect III. pp 1290 *et seq*

(a) *Davidson v. Carlton Bank*, (1893) 1 Q B 82, C A.

(b) *Gardner v. Shaw*, 19 W R 753; *Corbett v. Rowe*, 25 W R 69.

(c) *Lamb v. Bruce*, 45 L J. Q. B. 538. See *Hollingsworth v. White*, 10 W R 619.

(d) *Elliott v. Freeman*, 7 L T N S. 715.

(e) *Exp. McHattie, Re Wood*, 10 Ch. D 398, C. A.

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Copy of bill
of sale to be
filed

which occur in the original document (*f*), or if blanks are left which do not occur in the original (*g*), provided such errors or omissions are not calculated to mislead.

Sect 10 does not require that the bills of sale and the schedule or inventory should themselves be filed, but only a copy thereof, together with the affidavit, though the originals of all the documents must be presented to the registrar

Under the Act of 1854, which allowed either originals or copies to be filed, it was held that the registration of a copy of a schedule, together with the original bill, was permissible where the original schedule had been disannexed from the bill and lost (*h*).

A certificate of the filing of the bill of sale is no proof that a valid affidavit had been filed (*i*); nor are the contents of a bill of sale proved by the certificate of the Court (*l*)

By sect. 13 of the Act of 1878, it is enacted that—

The registrar.

The masters of the Supreme Court of Judicature attached to the Queen's Bench Division of the High Court of Justice, or such other officers as may for the time being be assigned for this purpose under the provisions of the Supreme Court of Judicature Acts, 1873 and 1875, are to be the registrars for the purposes of that Act, and any one of the said masters may perform all or any of the duties of the registrar.

The duties of the registering officer are ministerial only, and it is not within his province to inquire whether the bill of sale and affidavit comply with the provisions of the Act (*l*)

Local registra-
tion of
contents of
bill of sale.

By sect 11 of the Act of 1882, it is provided that in case of the residence of the grantor or the situation of the goods enumerated in the bill of sale being outside the London Bankruptcy district, the registrar under the Act of 1878 must transmit to the local registry, within three days, an abstract of the contents thereof to be filed, kept, and indexed therein, in which searches may be made (*m*).

By sect. 17 of the Act of 1878, it is enacted that—

Affidavits.

Every affidavit required by or for the purposes of the Act may be sworn before a master of any Division of the High Court of Justice, or before any commissioner empowered to take affidavits in the Supreme Court of Judicature

Whoever wilfully makes or uses any false affidavit for the pur-

(*f*) *Exp. Kahn, Re Heuer*, 21 Ch. D. 371, C. A.

(*g*) *Sharp v. McHenry* (No 2), 38 Ch. D. 427.

(*h*) *Green v. Attenborough*, 3 H & C 468.

(*i*) *Mason v. Wood*, 1 C. P. D. 63.

(*l*) *Emmott v Marchant*, 3 Q. B. D. 555.

(*l*) *Needham v. Johnson*, 15 W. R. 346.

(*m*) See R. S. C., Ord LXb. And see *Trinder v. Raynor*, 56 L. J. Q. B. 422.

poses of the Act shall be deemed guilty of wilful and corrupt perjury

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An affidavit of due execution, and consequently the registration of a bill of sale will be void, if sworn before a commissioner of oaths who has acted in the matter as solicitor for the grantee (n).

Affidavit of execution.

A reference by the grantor to an affidavit, as sworn before a commissioner of a wrong Court, the commissioner being also a commissioner of the right Court, did not invalidate the affidavit (o).

The affidavit to be filed on registration must state the true date on which the bill of sale was executed; but a statement that the bill of sale was executed on the day on which it is dated is sufficient (p).

Statement of date of execution

The affidavit must also state that the bill was duly executed and attested.

Statement of due execution and attestation

The decisions as to the sufficiency of the affidavit of due attestation for the most part relate to attestation by a solicitor and explanation of the effect of the bill, which are no longer required in the case of bills of sale given by way of security (q). It would seem that in the case of any attesting witness, no less than in the case of a solicitor, it is not necessary to say in so many words that the witness attested, if the fact may be gathered upon reading the whole affidavit (r).

Sufficiency of attestation

It is sufficient if the description of the grantor is in the introductory part of the affidavit (s).

Description of grantor.

A description in the bill of sale is not enough; there must be the description in the affidavit filed with it (t). If there is no description in the affidavit (u), or if the description therein is untruly stated (x), the defect cannot be supplied by reference to the bill of sale. But if the description in the affidavit is ambiguous, it is sufficient if the copy of the bill of sale annexed to the affidavit gives the requisite information with reasonable certainty, so as to identify the grantor (y).

(n) *Baker v Ambrose*, (1896) 2 Q. B. 372. 402.

(o) *Cheney v. Courtis*, 32 L. J. N. S. C. P. 116.

(p) *Lamb v Bruce*, 45 L. J. Q. B. 538.

(q) See ante, p. 241.

(r) *Yates v Ashcroft*, 31 W. R. 156. See *Cooper v Zeffert*, 32 W. R.

(s) *Blasberg v Parke*, 10 Q. B. D. 90.

(t) *Hutton v. English*, 7 E. & B. 94.

(u) *Pekard v Bretz*, 5 H. & N. 9.

(x) *Brodrick v. Seal*, L. R. 6 C. P. 98.

(y) *Jones v. Harris*, L. R. 7 Q. B.

157, *Exp Mackenzie, Re Bent*, 42 L. J. Bk. 25.

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An affidavit, which in effect verified the correctness of the descriptions and residences of the parties as contained in the bill of sale, was held to be sufficient (*a*)

Where the description of the residence and occupation was contained in the bill of sale, but the occupation was not described in the affidavit, the Act was not complied with (*b*), though the grantor was referred to in the affidavit as *the said* C B (*c*)

The sufficiency of the description is a question for the judge, and not for the jury (*d*).

Sufficiency of
description

The burden of proof is on the person seeking to impugn the description (*e*).

A description by a deponent to the best of his belief is sufficient (*f*) A description of the deponent in the affidavit itself is sufficient (*g*).

The description must be of the residence and occupation at the time of swearing the affidavit, and not of executing the bill of sale (*h*) But this did not apply when, after execution, the grantor left his residence for America (*i*)

Description
where several
grantors

If there are two grantors, the affidavit must describe the residence and occupation of both. So, where a bill of sale was executed by two grantors, of whom one was in possession of the goods at the time of their seizure under a *fi fa*, an affidavit describing the residence and occupation of that grantor only was held to be insufficient (*k*).

But in a case where a bill of sale and the affidavit filed on its registration described the grantors (who were father and son) by their true addresses, and added that they were manufacturers carrying on business together under a specified firm; and it appeared that they had, in fact, formerly carried on the business of manufacturers in partnership, but, at the time when the bill of sale was executed, the partnership had been dissolved, and the business was being carried on by the father alone, the son being in his employment as a clerk; the property comprised in the deed in fact belonged to the father alone, though both

(*a*) *Foulger v Taylor*, 5 H & N 202. See *Banbury v White*, 9 Jur. N S. 913

(*b*) *Hatton v English*, 7 E & B 94

(*c*) *Pickard v Bietz*, 5 H. & N 9.

(*d*) *Philips v Burt*, 2 F. & F 862

(*e*) *Sutton v Bath*, 3 H & N 382,

Grant v Shaw, L R 7 Q B 700

(*f*) *Roe v Bradshaw*, L R 1 Ex 106.

(*g*) *Allen v. Thompson*, 1 H. & N.

15, *Sladden v Sargeant*, 1 F & F 322, *Exp Lowenthal*, L R 9 Ch A 329

(*h*) *Button v O'Neill*, 4 C P D 354, disapproving of *London and Westminster Loan Co v Chace*, 12 C B N S. 730

(*i*) *Exp Kahen, Re Hewer*, 21 Ch D. 871.

(*k*) *Hooper v. Farmer*, 10 W. R. 648.

father and son joined in the assignment; the father alone filed a liquidation petition: it was held that there was no misdescription of the grantors such as to affect the validity of the registration, first, because the son not being a bankrupt, any misdescription of him was immaterial; secondly, because as to the father, the statement that he was carrying on business with the son was mere surplusage, and was not misleading (?).

The Bills of Sale Act, 1854, did not require the name of the grantor to be stated; neither do the Acts of 1878 and 1882 (*m*), and accordingly, where in an affidavit, as well as in the bill itself, the christian name of the grantor was wilfully misstated, for the purpose of concealing the fact that he had given a bill of sale, it was held that, it not being alleged that the execution creditor was misled by the description, the registration was not thereby rendered invalid (*n*). In both the cases last cited the Court laid stress on the fact that it was the christian name, and not the surname, which was misstated, and pointed out that a person searching the register would look to the surname, not to the christian name. But in a later case a bill of sale given in an assumed name, by which alone the grantor was known in the locality where she resided, was held to be duly executed and registered (*o*).

Both in the case of the grantor and of the attesting witness, the requirement as to residence is complied with by reference to the place of business or employment, though he sleep elsewhere (*p*). If he has two residences, it has been held in one case that they must both be stated (*q*), but it seems to be now settled that it is sufficient to state the principal place of residence or business (*r*).

A witness, if a clerk or otherwise employed by another person, may describe himself as such, and give as his address his employer's place of business, provided that he is habitually to be found at that address, so that persons interested in the goods can be sure the inquiries addressed there will reach him (*s*).

(*l*) *Exp Popplewell, Re Storey*, 21 Ch D 73, C A

(*m*) *Exp McHattie, Re Wood*, 10 Ch D 398, C A

(*n*) *Dovens v Salmon*, 20 Q B D 775

(*o*) *Central Bank of London v. Hawlins*, 60 L. T. 901

(*p*) *Blackwell v England*, 8 E & B 541, *Attenborough v Thompson*, 2 H. & N. 559.

(*q*) *Wallis v. Smith*, W N (1882) 77.

(*r*) *Exp Knightley, Re Moulson*, 51 L J Ch 823, *Cooper v Ibberson*, 29 W R. 566; *Greenham v. Child*, 24 Q B D 29 See *Heuer v. Cox*, 3 E & E 428

(*s*) *Simmons v Woodward*, (1892) A. C 100, *Hickley v. Greenwood*, 59 L. T. 137 See *Lamb v. Bruce*, 24 W. R. 645.

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Mistake in
description

An erroneous addition (*s*) or omission (*t*) in the statement of the residence, if not calculated to mislead, will not vitiate the affidavit.

A mistake in the number of the street has been held to be fatal (*u*).

A statement that the attesting witness was "residing at Acton, in the city of London," was held not to vitiate the affidavit, though Acton is in Middlesex (*x*).

Description of
attesting
witness

The affidavit must contain the description of every attesting witness (*y*).

No statement of the occupation of a trading company is necessary, nor of its directors, who sign the bill of sale as such for the purpose of authenticating the seal, and accordingly are not considered to be attesting witnesses within the Act (*z*).

Description of
witness as
"gentle-
man"

A peer is sufficiently described by his title (*a*).

The description "gentleman," which means a person without an occupation (*b*), was held to be improperly applied to a clerk in a government office (*c*); to a solicitor (*d*); to an attorney's clerk (*e*); to a person who had been an attorney, but was acting as clerk to another attorney (*f*); to a traveller for a house of business (*g*); in fact, to anyone who has an employment (*g*); but it is sufficient if the witness has no employment, or no regular employment (*h*), or if he is only a dormant partner in a firm (*i*).

Descriptions
held to be
insufficient.

The following descriptions were held not sufficient:—"accountant," by a clerk in an accountant's office (*k*); "esquire," when the grantor was manager of a theatre (*l*); "as of the City of Cork, law clerk," as not giving sufficient facility for

(*s*) *Hewer v Cox*, 3 E & E 428, Exp McHattie, 10 Ch D. 390, C A.

(*t*) *Throssell v Marsh*, 53 L T 321.

(*u*) *Murray v McKenue*, L R. 10 C P 625.

(*x*) *Blount v. Harris*, 4 Q. B D 603.

(*y*) *Pickard v Marriage*, 1 Ex D 364, *Nicholson v. Cooper*, 3 H & N 384.

(*z*) *Shears v Jacob*, L R. 1 C P 513, *Deffell v White*, L R. 2 C P. 144.

(*a*) *Re Earl of Limerick*, 7 Ir. Jur N S 65.

(*b*) *Gray v Jones*, 14 C B N. S. 743.

(*c*) *Allen v. Thompson*, 1 H. & N 15; *Brodrick v. Seals*, L. R. 6 C P. 98.

(*d*) *Tuton v Sanoner*, 3 H & N 280.

(*e*) *Dryden v Hope*, 9 W R 18.

(*f*) *Mathews v Buchanan*, 5 T L R 373.

(*g*) *Beales v Tennant*, 29 L J Q B 188, *Adams v Graham*, 33 L J Q B. 71.

(*h*) *Morewood v S Yorkshire Rail & Co*, 3 H & N 798, *Sutton v Bath*, 3 H. & N. 382, *Smith v Cheese*, 1 C P D 60.

(*i*) *Feast v Robinson and Fisher*, W N (1894) 14.

(*k*) *Larchin v North-Western Deposit Bank*, L R. 10 Ex 64, not extending *Briggs v Boss*, L R 3 Q B. 268.

(*l*) *Exp. Hooman*, L. R. 10 Eq 63.

finding the witness if required (*m*); "until lately a commercial traveller," when he was a commercial traveller (*n*); "tutor," when he was a schoolmaster (*o*).

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Where the grantor of a bill of sale in the affidavit filed under sect 10 described himself as carrying on business as a wine merchant, he being in fact only a paid manager, the misdescription was held fatal (*p*).

The following descriptions were held sufficient: "now in no occupation," of a person formerly in the militia (*q*); "government clerk," being a clerk in the Admiralty (*r*); "widow," where the witness was widow and executrix of her husband, a farmer, winding up the business through a bailiff (*s*); "wife of" A. B., where the witness was a lessee of a public-house, in which her husband carried on business under a licence taken out in his name (*t*).

Descriptions held to be sufficient

If the grantor or witness exercises more than one occupation, it would seem to be sufficient if the principal occupation is stated in the affidavit (*u*).

A future occupation which is merely in prospect, and has not actually commenced (*x*), or an occupation which has ceased (*y*), need not be described. But the ordinary occupation of a person should be stated, though he is out of employment at the time of making the affidavit (*z*).

xvi.—Renewal of Registration.—By sect 11 of the Act of 1878, it is enacted as follows.—

"The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and, if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void

Renewal of registration.

"The renewal of a registration shall be effected by filing with the registrar an affidavit stating the date of the bill of sale, and of the last registration thereof, and the names, residences, and occupations

(*m*) *Re Hams*, 10 Ir. Ch. R. 100

(*n*) *Castle v. Downton*, 5 C. P. D. 56

(*o*) *Lee v. Turner*, 20 Q. B. D. 373

(*p*) *Cooper v. Davis*, 32 W. R. 329,

C. A.

(*q*) *Trousdale v. Shephard*, 14 Ir. C. L. R. 370

(*r*) *Grant v. Shaw*, L. R. 7 Q. B. 700

(*s*) *Luckin v. Hamlyn*, 18 W. R. 43, *Exp. Chapman*, W. N. (1881) 109,

C. A.

(*t*) *Usher v. Martin*, 61 L. T. 778.

(*u*) *Throssell v. Marsh*, 53 L. T. 321; *Exp. National Deposit Bank, Re Wells*, 26 W. R. 624. The rule appears to be different in Ireland. See *Re Fitzpatrick*, 19 L. R. Ir. 206

(*x*) *Exp. Chapman, Re Davey*, 45 L. T. 268.

(*y*) *Exp. National Mercantile Bank*, 15 Ch. D. 42, C. A.

(*z*) *Sharp v. McHenry* (No. 2), 38 Ch. D. 427

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of the parties thereto as stated therein, and that the bill of sale is still a subsisting security

"Every such affidavit may be in the form set forth in the schedule (A) to this Act annexed

"A renewal of registration shall not become necessary by reason only of a transfer or assignment of a bill of sale."

A bill of sale, the registration of which has become void for want of renewal, cannot be renewed under sect 14 of this Act, which empowers the Court to rectify the register on being satisfied that an omission to register, or a defect in the registration, was accidental or due to inadvertence, or under sect 23, which prescribes the mode of renewing registration of bills made under the former Acts (a).

Effect of
omission to
re-register.

The Act of 1882 (b) does not apply to any bill of sale registered before its commencement unless avoided by non-renewal or otherwise; and if the registration of a bill of sale becomes void by omission to renew, the bill will still be good as between grantor and grantee (c).

But a bill of sale registered since the commencement of this Act (d) will be void for all purposes unless duly re-registered (e).

The affidavit.

The affidavit must state the name and residence stated in the bill of sale, although they be erroneous (f). It is sufficient if the residence of the witness is stated in the introductory part of the affidavit, although it is not in the body (g).

xvii.—The Register—By sect 12 of the Act of 1878, it is enacted as follows.—

Form of
register.

"The registrar shall keep a book (in the Act called 'the register') for the purposes of the Act, and shall, upon the filing of any bill of sale or copy under the Act, enter therein in the form set forth in the second schedule (B.) to the Act annexed, or in any other prescribed form, the name, residence, and occupation of the person by whom the bill was made or given (or in case the same was made or given by any person under or in the execution of process, then the name, residence, and occupation of the person against whom such process was issued), and also the name of the person or persons to whom or in whose favour the bill was given, and the other particulars shown in the said schedule or to be prescribed under the Act, and shall number all such bills registered in each year consecutively, according to the respective dates of their registration.

(a) *Aslew v Lewis*, 10 Q. B. D. 477, *Re Emery, Exp. Off Rec*, 21 Q. B. D. 405, C. A.

(b) See sect. 3 of that Act

(c) *Cookson v. Swire*, 9 App. Cas. 653,

(d) 31st October, 1882

(e) *Fenton v Blythe*, 25 Q. B. D. 417.

(f) *Exp. Webster, Re Morris*, 22 Ch.

D. 136

(g) *Blasberg v. Parke*, 10 Q. B. D. 90.

"Upon the registration of any affidavit of renewal the like entry shall be made, with the addition of the date and number of the last previous entry relating to the same bill, and the bill of sale or copy originally filed shall be thereupon marked with the number affixed to such affidavit of renewal

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"The registrar shall also keep an index of the names of the grantors of registered bills of sale with reference to entries in the register of the bills of sale given by each such grantor."

By sect. 14 of the same Act it is enacted that—

"Any judge of the High Court of Justice, on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act, or the omission or misstatement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter, as he thinks fit to direct."

Rectification of register

The Court of Appeal has no jurisdiction under this section (*h*).

The jurisdiction of a judge, under this section, as to rectification is limited to the register, and does not enable him to rectify mistakes in the affidavit (*i*). Possibly, however, an extension of time for registration might be granted under this section so as to enable a fresh affidavit to be filed (*j*).

The jurisdiction will not be exercised after third parties have acquired rights; and the time of registration or re-registration cannot be extended, so as to defeat the right of an execution creditor (*k*) or of a trustee in bankruptcy (*l*).

The section is not retrospective (*m*).

By sect 16 it is enacted as follows:—

"Any person shall be entitled to have an office copy or extract of any registered bill of sale, and affidavit of execution filed therewith, or copy thereof, and of any affidavit filed therewith, if any, or registered affidavit of renewal, upon paying for the same at the like rate as for office copies of judgments of the High Court of Justice, and any copy of a registered bill of sale, and affidavit purporting to be an office copy thereof, shall in all Courts and before all arbitrators or other persons, be admitted as *prima facie* evidence thereof, and of the fact and date of registration as shown thereon "

Office copies

(*h*) *Exp. Webster, Re Morris*, 48 L. T. 295

(*i*) *Crew v. Cummings*, 21 Q. B. D. 420, C. A.

(*j*) *Re Dobbins' Settlement*, 56 L. J. Q. B. 295.

(*k*) *Crew v. Cummings*, *supra*

(*l*) *Re Parsons, Exp. Furber*, (1893) 2 Q. B. 122, C. A.

(*m*) *Askew v. Lavis*, 10 Q. B. D. 477, *Re Emery, Exp. Off. Rec.*, 21 Q. B. D. 405, C. A.

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By sect. 16 of the Act of 1882 (repealing in part sect. 16 of the Act of 1878), any person may search the registry on payment of one shilling or other prescribed fee, and inspect and make extracts from registered bills of sale; which extracts are limited to the date of execution, and other prescribed particulars.

The office copy of the registry was held valid evidence under 14 & 15 Vict c 99, s 14 (*n*)

The book kept under the Act is within 13 & 14 Vict. c 99, s 44, and a certified copy of it is admissible in evidence, and as the bill of sale and affidavit must be filed simultaneously, the date of the affidavit can be inferred from the date of filing the bill (*o*).

A copy of a bill of sale is not to be filed in any Court, unless the original, duly stamped, is produced to the proper officer (*p*).

Fees

As to fees, see sects. 18 and 19 of the Act of 1878.

xviii.—Transfers and Assignments of Bills of Sale—Sect. 10 of the Act of 1878 further enacts that—

Transfers, &c
need not be
registered

“A transfer or assignment of a registered bill of sale need not be registered.”

Transfer and
further
charge

If, upon a transfer, a further sum is advanced, the deed is an effectual security for the amount owing in respect of the original advance without registration (*g*); but it would seem doubtful whether the deed, unless registered, would be a valid security for the further sum (*r*).

Sub-mortgage
by deposit
of bill of sale

A memorandum by way of sub-mortgage given by the holder of a registered bill of sale, accompanied by a deposit of the bill, is within the protection of this section, and does not require registration, though the transferee subsequently acquires the equity of redemption under the bill of sale (*s*).

Registration
of transfer
will not
validate
unregistered
bill of sale.

The grantee of a bill of sale cannot by assignment pass to the assignee a better title than he has himself (*t*); and, accordingly, where a grantee under an unregistered bill of sale assigned the goods comprised therein by a bill of sale duly registered, it was

(*n*) *Sutton v Bath*, 3 H & N. 382, *Grindall v Brendon*, 6 C. B N S 698

(*o*) *Grindall v Brendon*, *sup*

(*p*) Stamp Act, 1893 (56 & 57 Vict c. 41), s 41

(*g*) *Horne v. Hughes*, 6 Q B D 676, C A

(*r*) *Ibid*, at p. 683 See *Wale v Commissioners of Inland Revenue*, 4 Ex D 270

(*s*) *Exp Turquand, Re Parker*, 14 Q B D 636, C A

(*t*) *Exp Odell, Re Walden*, 39 L T. 333, this point is not referred to in S. C., 10 Ch D. 76.

held that the want of registration of the original bill vitiated the title of the assignee (u) CHAPTER XIV

Though the assignment need not be registered, the assignee must re-register the original bill of sale every five years (x). Assignee must re-register

xix.—**Vacation of Bills of Sale**—A bill of sale is vacated without re-assignment by a memorandum of satisfaction in the prescribed manner.

By sect. 15 of the Bills of Sale Act, 1878, it is enacted that —

“Subject to and in accordance with any rules to be made under and for the purposes of this Act, the registrar may order a memorandum of satisfaction to be written upon any registered copy of a bill of sale upon the prescribed evidence being given that the debt, if any, for which such bill of sale was made or given has been satisfied or discharged” Entry of satisfaction

By the Rules of the Supreme Court, O LXI. (y), it is provided as follows:—

R 26 “A memorandum of satisfaction may be ordered to be written upon a registered copy of a bill of sale, on a consent to the satisfaction, signed by the person entitled to the benefit of the bill of sale, and verified by affidavit, being produced to the registrar, and filed in the Central Office.” Memorandum of satisfaction of bills of sale

R 27. “Where the consent in the last preceding rule mentioned cannot be obtained, the registrar may, on application by summons, and on hearing the person entitled to the benefit of the bill of sale, or on affidavit of service of the summons on that person, and in either case on proof to the satisfaction of the registrar that the debt (if any) for which the bill of sale was made has been satisfied or discharged, order a memorandum of satisfaction to be written upon a registered copy thereof.” Order for memorandum of satisfaction

The repealed Act of 1854 required the consent to be signed in the presence and to be verified by the affidavit of a solicitor, and though these requirements are not expressly contained in the present Act, it was, till recently, the practice generally to require the consent to be so verified. But in a recent case it has been held that the affidavit verifying the signature and consent of the person entitled to the benefit of a bill of sale to the entry of satisfaction of the bill of sale need not be made by a solicitor (z). Consent to satisfaction.

(u) *Chapman v Knight*, 5 O P D 308

(x) *Karet v Kosher Meat Association*, 2 Q B. D. 361.

(y) A form of summons and affidavit is given

(z) *Re White and Rubery*, (1894) 2 Q. B. 923

CHAPTER XIV

Act of 1878,
s 20.

XX.—Order and Disposition Clause in Bankruptcy — The registration of an absolute bill of sale of itself gives the notoriety which excludes the application of the doctrine of reputed ownership, for it was thus enacted by sect. 20 of the Act of 1878.—

Order and
disposition

Chattels comprised in a bill of sale which has been and continues to be duly registered under the Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the B A 1869 (*a*).

Repeal of
sect 20.

This section has been repealed only in respect of bills of sale given by way of security (*b*). The effect of the repeal, as regards such bills, is to restore the rule under the Act of 1854, under which it was held that registration did not exclude the doctrine of reputed ownership (*c*).

But notwithstanding the repeal of sect 20, the effect of sect 3 of the Act of 1882 is that chattels comprised in a bill of sale registered under the Act of 1878, before the coming into operation of the Act of 1882, are not, so long as the registration is subsisting, within the "order and disposition" clause, even when an act of bankruptcy is committed by the grantor after the coming into operation of the Act of 1882 (*d*).

During the seven days between the making and the registration of a bill of sale, the order and disposition clause does not apply (*e*).

The clause in the Bankruptcy Act, 1883, protecting conveyances or assignments by bankrupts for valuable consideration, if made before the date of the receiving order in good faith and without notice, has no operation as regards a transaction void under the Bills of Sale Acts (*f*).

(*a*) 32 & 33 Vict. c 71.

(*b*) Act of 1882, ss 3, 15 See *Swift v Pannill*, 24 Ch D 210, *Reeves v Barlow*, 12 Q B D 436, C A, *Hall v. Smith*, W. N. (1887) 170, C A.

(*c*) *Stansfeld v Cubitt*, 2 De G & J 222, *Badger v Shaw*, 29 L J. Q B. 73, *Re Daniel*, 25 L T. 188, *Exp.*

Harding, Re Fanbrother, L R 15 Eq. 223.

(*d*) *Exp Izard, Re Chapple*, 23 Ch D 409, C A

(*e*) *Exp Kahan, Re Heuer*, 21 Ch D 871.

(*f*) *Exp Attuater*, 5 Ch D 27, C A See *Re Waugh*, 4 Ch D 524.

CHAPTER XV.

OF MORTGAGES OF SHIPS, FREIGHT AND CARGO.

SECTION I.

MORTGAGES OF SHIPS AND SHARES THEREIN.

i.—Registration of British Ships and of Owners of Ships and Shares —A ship is not like an ordinary chattel; it does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for ships (*a*)

Ship not a
chattel
passing by
delivery.

Mortgages of British ships have long been the subject of statutory regulations, which were so strict in regard to defects in the assurance as almost to oust the jurisdiction of equity: but all former statutes were repealed by the Merchant Shipping Repeal Act, 1854 (*b*) And in the same year the Merchant Shipping Act, 1854 (*c*), was passed, which, with the amending Acts (*d*), has been repealed by the Merchant Shipping Act, 1894 (*e*), which has consolidated the previous law on the subject.

Statute law as
to mortgages
of ships

Mortgages of British ships are now exclusively regulated by the Merchant Shipping Act, 1894 (*e*). This Act substantially re-enacts the provisions relating to or affecting mortgages of ships and shares contained in the former Acts, and accordingly the decisions on those Acts appear for the most part to be in force in determining the construction of the present Act and the rights of parties thereunder

Merchant
Shipping Act,
1894

A British ship within the meaning of the Act is a ship the owners of which comply with the qualifications as to birth, naturalization, or denization mentioned in the Act, but not British-born persons bearing allegiance to a foreign State; also bodies corporate established under and subject to the laws of,

Meaning of
term "British
ship."

(*a*) *Hooper v Gunn*, L R 2 Ch A.

290 (*b*) 17 & 18 Vict c 120.

(*c*) 17 & 18 Vict c 104.

(*d*) 43 & 44 Vict c 18.

(*e*) 57 & 58 Vict c 60

CHAPTER XV.	and having their principal place of business in, some part of her Majesty's dominions (<i>f</i>)
Registration of British ships	Every British ship must be registered, and will not be recognized as a British ship until registered, in manner prescribed by the Act (<i>g</i>)
Division of ship into sixty-four shares	In contemplation of the Act a ship is divided into sixty-four shares, and any one or more shares, but not a fractional part of a share, may be the subject of mortgage under the Act (<i>h</i>) The Act of 1894 enacts as follows:—
Register book	<p>Sect 5 "Every registrar of British ships shall keep a book to be called the register book, and entries in that book shall be made in accordance with the following provisions:—</p> <ol style="list-style-type: none"> (1) The property in a ship shall be divided into sixty-four shares (2) Subject to the provisions of this Act with respect to joint owners or owners by transmission, not more than sixty-four individuals shall be entitled to be registered at the same time as owners of any one ship; but this rule shall not affect the beneficial title of any number of persons or of any company represented by or claiming under or through any registered owner or joint owner (3) A person shall not be entitled to be registered as owner of a fractional part of a share in a ship, but any number of persons, not exceeding five, may be registered as joint owners of a ship, or of any share or shares therein (4) Joint owners shall be considered as constituting one person only as regards the persons entitled to be registered, and shall not be entitled to dispose in severalty of any interest in a ship, or in any share therein, in respect of which they are registered (5) A corporation may be registered as owner by its corporate name"
Entry of particulars in register book.	<p>The Act of 1894, after providing for declarations as to ownership by individual owners and corporate bodies (<i>i</i>), and as to the evidence to be produced on the registry of a ship (<i>l</i>), proceeds, by s. 11, to prescribe that the registrar shall enter in the register book particulars as to (1) the name and port of the ship; (2) details as to her tonnage, build, and description; (3) particulars of origin; (4) names and descriptions of her registered owner or owners, and if there is more than one owner, the proportions in which they are interested.</p> <p>By sects. 56 and 57 of the same Act it is enacted as follows:—</p>
Notice of	Sect. 56. "No notice of any trust, express, implied, or constructive,

(*f*) 57 & 58 Vict c. 60, s 1.(*i*) Sect 9(*g*) *Ibid* s. 2(*l*) Sect. 10.(*h*) *Ibid* ss. 5, 31.

shall be entered in the register book or be receivable by the registrar, and subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share, and to give effectual receipts for any money paid or advanced by way of consideration "

CHAPTER XV

trusts not
received

Sect 57 "The expression beneficial interest, whenever used in this part of this Act, includes interests arising under contract and other equitable interests, and the intention of this Act is, that without prejudice to the provisions of this Act for preventing notice of trusts from being entered in the register book, or received by the registrar, and without prejudice to the powers of disposition and of giving receipts conferred by this Act on registered owners and mortgagees, and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests, may be enforced by or against owners and mortgagees of ships in respect of their interest therein, in the same manner as in respect of any other personal property "

Equities not
excluded by
Act

Accordingly, where a transfer of a ship was executed in the form prescribed by s 55 of the repealed Act of 1854, so as to be absolute in its terms, it was held that the owners were not precluded from showing that the transfer was intended to be as a security only (l).

Evidence of
equities

Similarly, where a mortgage of a ship was made in the form prescribed by s 66, and transferred according to the form prescribed by s 73, it was held that the Court was at liberty, by virtue of the section above set out, in estimating the rights of the transferee of the mortgage, to consider not only the registered documents, but all the transactions relating to the loan (m).

Sections 14 to 23 of the Act of 1894 contain provisions as to certificates of registry on which all changes of ownership must be indorsed; and, by s 15, it is enacted that, "The certificate of registry shall be used only for the lawful navigation of the ship, and shall not be subject to detention by reason of any title, lien, charge, or interest whatever, had or claimed by any owner, mortgagee, or other person to, on, or in the ship"; and the refusal to deliver it on demand to the person entitled to it for the purpose of navigation, officers of customs, or other person legally entitled to require it, is punishable by penalty.

Certificates
of registryCustody of
certificate

It is, therefore, illegal to pledge the certificate, and the person entitled to it for the purpose of navigation, though himself

Certificate
cannot be
pledged

(l) *Ward v. Beck*, 13 C. B. N. S. 668; also *Kenoula*, 11 F. D. 92.
Linnafallen, L. R. 1 A. & E. 72. See (m) *Cuthcart*, L. R. 1 A. & E. 314.

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the pledger, may maintain an action (*n*), after demand for its delivery, and may recover damages for the wrongful detainee, in addition to his right to proceed for the penalty.

The Act of 1894 contains the following provisions as to transfers and transmission of ships and shares therein —

Transfer of ships or shares

Sect 24 —“(1) A registered ship or a share therein (when disposed of to persons qualified to own a British ship) shall be transferred by bill of sale

“(2) The bill of sale shall contain such description of the ship as is contained in the surveyor's certificate, or some other description sufficient to identify the ship to the satisfaction of the registrar, and shall be according to the form marked A in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of, and be attested by, a witness or witnesses ”

Declaration of transfer

By s. 25, it is provided that a transferee shall not be registered until he, or, in the case of a corporation, the proper officer, has made a declaration stating his qualification, or that of the corporation, to be registered as owner; and that no unqualified person or body of persons is entitled as owners to any legal or beneficial interest in the ship or any share therein.

Register of transfer

By s. 26, upon production to the registrar of the transfer and prescribed declaration, he is to enter in the register book the name of the transferee, and to indorse on the transfer the fact of such entry, with the date and hour thereof. Transfers are to be registered in the order of their production to the registrar.

Validity of transfer in bankruptcy

The mere transfer of a ship under s. 24 gives the transferee a good title against the trustee in bankruptcy of the transferor, although, until registration, he could not transfer it to a purchaser under s. 26 (*o*)

Improper transfer

A registration founded on a sale by an attorney in excess of his power was held to give no title, even at law, to the person thereby registered as owner (*p*); and a re-transfer was directed to be executed by a person who had been registered as owner under a mistake as to title (*q*)

Distinction between legal and equitable interests

In the transfer of a British ship, there is a clear distinction between the legal estate and mere beneficial interests therein

(*n*) *Wiley v Crawford*, 1 B. & S. 253, 265

(*o*) *Stapleton v. Hayman*, 2 H. & C. 918.

(*p*) *Orr v. Dickenson*, John 1

(*q*) *Holderness v Lampost*, 29 Beav. 129.

A sale of the beneficial interest by licitation, without a bill of sale, does not entitle the purchaser to be registered as owner (?)

Sect 27 of the Act provides that, "where the property in a registered ship or share therein is transmitted to a person qualified to own a British ship on the marriage, death, or bankruptcy of any registered owner, or by any lawful means other than by a transfer under this Act," such transmission shall be authenticated by means of a declaration of transmission identifying the ship and containing prescribed statements, and accompanied by certain prescribed evidence; and that the registrar, on receipt of the declaration of transmission so accompanied, is to enter in the register book the name or names of the person or persons entitled to be registered by virtue of the transmission

Transmission of property in ship on death, marriage, bankruptcy, &c

If a ship or a share or shares therein intended to form the security for a loan have passed from the original owner by transfer or transmission, the intending mortgagee should satisfy himself, by inspection of the documents of title and the register book, that the required formalities have been observed, so as to confer a good title to the property (s).

Precautions to be taken by mortgagee of transferred or transmitted ship

ii.—Form and Registration of Mortgages of Ships and Shares.

—With regard to mortgages of ships and shares in ships, the Act of 1894 contains the following enactments:—

Sect 31 —“(1) A registered ship, or a share therein, may be made a security for a loan or other valuable consideration, and the instrument creating the security (in this Act called a mortgage) shall be in the form marked B in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar of the ship's port of registry shall record it in the register book

Mortgage of ship or share

“(2) Mortgages shall be recorded by the registrar in the order in time in which they are produced to him for that purpose, and the registrar shall by memorandum under his hand notify on each mortgage that it has been recorded by him, stating the date and hour of that record ”

A mortgage of a ship passes, as incident thereto, all articles necessary to the navigation of the ship or to the prosecution of

What passes by mortgage of ship

(r) *Chasteaufneuf v Capeyron*, 7 App. Cas 127

(s) *Stapleton v. Haymen*, 2 H & C. 918

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the adventure which were on board at the date of the mortgage, and articles brought on board subsequently to the mortgage in substitution for the same (*u*) *A fortiori*, if the mortgage is expressed to be of a ship "with the appurtenances," the term "appurtenances" will pass to the mortgagee anything which is on board for the accomplishment of the voyage and of the adventure (*x*) So a chronometer was held to pass to the mortgagee as an "appurtenance" of the ship (*y*) But cargo will not pass as an "appurtenance" (*z*)

Forms of documents, and instructions as to registry

By s. 65 of the Act, mortgages not in the prescribed form are not to be registered, except by direction of the Commissioners of Customs; but the Commissioners may from time to time, with the consent of the Board of Trade, alter the forms, upon giving public notice of such alterations.

Discrepancy between mortgage and register

A slight difference between the mortgage and the register in the name of the ship is of no consequence, if there is no doubt as to the identity, as where the mortgage was of the "City of Bruxelles," registered as the "City of Brussels" (*a*)

Unregistered mortgage

A mortgage is binding between the mortgagee and mortgagor, though the requisites of the registry are not complied with (*b*)

Collateral agreement

Mortgages in the prescribed form may properly be supplemented by unregistered collateral agreements (*c*).

Right of insurer

The right of an insurer of ships who is, but does not appear on the register as, the mortgagee to the proceeds of the policies is not affected by the Acts (*d*)

Deposit of policy

A security by way of deposit of a policy on a ship at sea, which is afterwards injured and condemned, may give the deposittee authority to sue on the policy, but it passes no property in the ship, and does not authorize the deposittee to give notice of abandonment as for a total loss (*e*)

Exception of

Mortgages of British ships and shares therein are excepted

(*u*) *Coltman v Chamberlain*, 25 Q. B. D. 326; *Hull Rope Co v Adams*, 65 L. J. Q. B. 114

(*x*) *Dundee*, 1 Hagg. 109, 8 C., sub nom. *Gale v Laurie*, 5 B. & Cr. 162

(*y*) *Langton v Horton*, 1 Ha. 549

(*z*) *Post*, p. 273

(*a*) *Bell v Bank of London*, 3 H. & N. 730

(*b*) *Lister v Payn*, 11 Sim. 348

(*c*) *Bentwell Tower*, 72 L. T. 664
See also *Innsfallen*, L. R. 1 A. & E. 72, *Cathcart*, L. R. 1 A. & E. 314

(*d*) *Ladbroke v Lee*, 4 De G. & S. 106

(*e*) *Jardine v Leathley*, 3 B. & S. 700

from the operation of the Bills of Sale Acts (*f*), and accordingly do not require to be made according to the form prescribed by the Bills of Sale Act, 1882, nor to be registered under those Acts (*g*) And such mortgages will be within the exception, though not made according to the form prescribed by, nor registered under, the Merchant Shipping Act, 1894 (*h*).

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mortgages of
ships from
Bills of Sale
Acts

All articles and materials passing by a mortgage of a ship by the word "appurtenances" are protected by the exception, so as to exempt the security by which they pass from the necessity of registration under the Bills of Sale Acts (*i*)

Fittings, &c
of ships.

A mortgage may be given without such registration on an unfinished ship in course of building which will effectually pass not only the ship itself but all things prepared for, though not actually attached to the ship (*k*) And a valid charge may similarly be given on a builder's interest in an unfinished ship by deposit of the builder's certificate (*l*)

Unfinished
ship

If a registered owner is desirous of mortgaging at any place out of the country in which the port of registry is situate, the registrar may enable him to do so by granting a "certificate of mortgage" giving him a power to mortgage (*m*) Previously to the grant of a certificate, entries must be made in the register book of the names of the persons by whom the power is to be exercised and the maximum amount of the charge to be created, and the place where, and the limit of time within which, the power is to be exercised (*n*) A certificate is not to be granted so as to authorize a mortgage within the United Kingdom if the port of registry is within the United Kingdom or in any British possession in which the port of registry is situate, or at or within the area of any port of registry established by Order in Council, or by any person not named by the certificate (*o*) Certificates of mortgage must contain a statement of the particulars directed to be entered in the register book, and an enumeration of any registered mortgages or certificates of mortgage or sale affecting the ship or shares in respect of which the certificate is given (*p*)

Certificates of
mortgage

(*f*) 41 & 42 Vict c 31, s 4, 45 & 46 Vict c 43

(*g*) See *ante*, pp 201, 202

(*h*) *Union Bank of London v Lenanton*, 3 C P D 243

(*i*) *Coltman v Chamberlain*, 25 Q B D 328, 331 See *ante*, p 259

(*k*) *Reid v Fairbanks*, 1 C L R. 787, *Woods v Russell*, 5 B & Ald 942.

(*l*) *Exp Hodgkin (or Winter), Re Softley*, L R 20 Eq 746.

(*m*) Sect. 39

(*n*) Sect 40

(*o*) Sect 41

(*p*) Sect 42

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Rules as to
certificates of
mortgagee

Sect 43 The following rules shall be observed as to certificates of mortgage —

- (1) The power shall be exercised in conformity with the directions contained in the certificate
- (2) Every mortgage made thereunder shall be registered by the indorsement of a record thereof on the certificate by a registrar or British consular officer
- (3) A mortgage made in good faith thereunder shall not be impeached by reason of the person by whom the power was given dying before the making of the mortgage
- (4) Whenever the certificate contains a specification of the place at which, and a limit of time not exceeding twelve months within which the power is to be exercised, a mortgage made in good faith to a mortgagee without notice, shall not be impeached by reason of the bankruptcy of the person by whom the power was given.
- (5) Every mortgage which is so registered as aforesaid on the certificate, shall have priority over all mortgages of the same ship or share created subsequently to the date of the entry of the certificate in the register book, and if there are more mortgages than one so registered, the respective mortgagees claiming thereunder shall, notwithstanding any express, implied, or constructive notice, be entitled, one before the other, according to the date at which each mortgage is registered on the certificate, and not according to the date of the mortgage
- (6) Subject to the foregoing rules, every mortgagee whose mortgage is registered on the certificate shall have the same rights and powers, and be subject to the same liabilities, as he would have had and been subject to if his mortgage had been registered in the register book instead of on the certificate
- (7) The discharge of any mortgage so registered on the certificate may be indorsed on the certificate by any registrar or British consular officer, upon the production of such evidence as is by this Act required to be produced to the registrar on the entry of the discharge of a mortgage in the register book, and on that indorsement being made, the interest, if any, which passed to the mortgagee shall vest in the same person or persons in whom it would (having regard to intervening acts and circumstances, if any), have vested if the mortgage had not been made
- (8) On the delivery of any certificate of mortgage to the registrar by whom it was granted, he shall, after recording in the register book, in such manner as to preserve its priority, any unsatisfied mortgage registered thereon, cancel the certificate and enter the fact of the cancellation in the register book, and every certificate so cancelled shall be void to all intents

Mortgagor in
possession.

iii.—Rights and Liabilities of Mortgagee in Possession.—So long as the mortgagee of a ship does not take possession, the mortgagor, as the registered owner subject to the mortgage,

retains all the rights and powers of ownership, and his contracts with regard to the ship will be valid and effectual, and bind the mortgagee, provided that his dealings do not materially impair the mortgagee's security.

Sect 34 "Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not, by reason of the mortgage, be deemed the owner of a ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof"

Mortgagee not treated as owner

Sect 35 "Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase-money, but where there are more persons than one registered as mortgagees of the same ship or share, a subsequent mortgagee shall not, except under the order of a Court of competent jurisdiction, sell the ship or share without the concurrence of every prior mortgagee"

Mortgagee to have power of sale

The Admiralty Division of the High Court of Judicature has jurisdiction over any claims in respect of any mortgage duly registered according to the provisions of the Act, whether the ship or the proceeds thereof be under the arrest of the Court or not, and will enforce equities between owners and mortgagees of ships (p).

Jurisdiction of Admiralty Division

The position of a mortgagor in possession is thus stated by Lord Cairns, C, in the leading case of *Keith v Burrows* (q). "The mortgagee of a ship does not, ordinarily speaking, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or, indeed, to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world not earning freight, but for the purpose of bringing home goods of his own or for his own benefit. Those goods which are brought home for him he may sell at their full market price when they arrive in this country, thereby, of course, bringing into his own pocket not merely the original value of the goods, but also the portion of remuneration which represents the value of the carriage of those goods from abroad. Or, again, he may, in making, through his master, a contract for freight at a foreign port, attach to the carriage of the goods a rate of freight, which may either be nominal or may be very far under the ordinary rate of freight of the market. All those acts

Rights of mortgagor in possession to user of ship and to freight

(p) Admiralty Court Jurisdiction *Catheart*, L. R. 1 A & E. 314
Act, 1861 (24 Vict c 10, s. 11), (q) 2 App. Cas 636, at p 645

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would be the ordinary incidents of the ownership of the mortgagor, who remains the *dominus* of the ship with regard to everything connected with its employment, until the moment arrives when the mortgagee takes possession. If the mortgagee is dissatisfied with the amount of authority which the mortgagor possesses by law, it is for him to put an end to the opportunity of exercising that authority by taking the control of the ship out of the hands of the mortgagor."

Mortgagor may bind mortgagee by charterparty or by lien for repairs

So, where a mortgagor had made a charterparty, which was not shown to be in any way prejudicial to the security, the mortgagees were bound by it (*r*). And a mortgagee permitting the mortgagor to retain possession and to use the ship, is bound by the lien for repairs of a shipwright to whom it was delivered by the mortgagor for that purpose (*s*).

Cesser of rights of mortgagor in possession on default

But if a mortgagor does any act or is guilty of any default which prejudices or injures the security of the mortgagee, sect 34 ceases to have any binding effect against the mortgagee, subject, as it would seem, to any subsisting contracts entered into by the mortgagor while in possession, of which the mortgagee has notice, or which are consistent with the ordinary use of the ship (*t*). And, in order to obtain the benefit of such contracts, the mortgagee must give notice to the other contracting party (*u*). So, where an owner had agreed with his mortgagee to insure the ship and subsequently chartered her, the mortgagee was entitled to prevent her from sailing uninsured (*x*).

Matters affecting mortgagees not in possession

A mortgagee not in possession cannot be compelled to join in a charterparty (*y*). He cannot maintain an action of restraint (*z*), nor can he recover passage-money received by the mortgagor before taking possession (*a*).

Rights of mortgagee of shares in ship on taking possession.

A mortgagee of shares in a ship, on taking possession, is only entitled to his mortgagor's part of the profit-freight after contributing proportionately with the other co-owners to the expenses of the outfit and of the voyage (*b*). He is not entitled himself to interfere with the control of the ship; he cannot after

(*r*) *Fanchon*, 5 P D 173. See also *Collins v Lamport*, 4 De G J & S 500, 505, *Blanche*, 58 L T 592

(*s*) *Williams v Allsup*, 10 C B N S 417, *Collins v Lamport*, *sup*

(*t*) *Celtic King*, (1894) P 175, at p 187. And see *post*, p 267.

(*u*) *Collins v Lamport*, *sup*.

(*x*) *Laming & Co v Seator*, 16 C of S Ca (Sc) 828, 4th Ser

(*y*) *Samuel v Jones*, 7 L T N S 760

(*z*) *Innisfallen*, L R 1 A & E 72

(*a*) *Wilks v Palmer*, 6 Jur N S 732

(*b*) *Alexander v Sims*, 5 De G. M. & G. 80.

the making of the charterparty arrest the ship, or demand bail in action on his mortgage, provided the performance of the charterparty is not prejudicial to his security (c), and, as regards the future control of the ship, it seems that he can only take possession by giving notice of his mortgage to the ship's husband (d), and claiming thereby a proportionate part of the profit-freight (e)

Where the mortgagor of shares is also the ship's husband, if the mortgagee joins with the owners of the other shares in the appointment of a new ship's husband before the completion of a voyage, the mortgagor loses all right, as ship's husband, to receive the freight, but he will have a lien on the freight for advances repaid by him on account of the ship previous to his removal (f)

The provisions in the statute (g) that persons beneficially interested in ships and shares therein shall, as well as the registered owner, be subject to pecuniary penalties imposed upon owners, excepts persons who are beneficially interested by way of mortgage Exemption of mortgagees from penalties

The duty of a mortgagee who has taken possession of a ship is to sell as soon as conveniently may be, but he is justified in employing the ship for a reasonable time to avoid selling Duty of mortgagee in possession So where a mortgagee, instead of selling the ship, employed it in hazardous and speculative adventures, and made great losses, he was charged with the value of the ship and fittings at the time he ought to have sold it (h).

What is said by Holt, C. J., in *Coggs v. Bernard*, against the use of any chattel bailed by way of necessity, which might be injured during the use made of it, cannot apply to the mortgage of a ship (i) Liability for injury to ship

(c) *Maxima*, 39 L T 112

(d) The "ship's husband" is an agent specially appointed by the owner or co-owners of a ship to superintend the equipment, repairs, management and other concerns of the ship. Where there are several owners, one of them is generally appointed managing owner or ship's husband. A ship's husband has the authority of the owners to procure a charterparty and generally to make contracts for their benefit, but he cannot cancel a charterparty. *Thomas v. Lewis*, 4 Ex D. 23. The name and address of the managing

owner, ship's husband or other manager for the time being, must be registered at the port of registry of the ship. See Merchant Shipping Act, 1894, s 59.

(e) *Maxima*, 39 L T 112

(f) *Beynon v. Godden*, 3 Ex D. 263, Q. A.

(g) Sect 58.

(h) *Marriott v. Anchor Reversionary Society*, 3 De G F & J 117, *De Mattos v. Gibson*, 1 J & H 83. And see *European & Co v. Royal Mail & Co*, 4 K & J 676.

(i) *Ld Raym.* 909, 916.

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Liability of mortgagee for repairs

So long as the mortgagor, being in possession, continues, by virtue of sect 34, to be the owner of the ship, the mortgagee incurs no liability as to repairs or necessities by reason of his legal title, nor is his security postponed to or affected by a claim in respect of necessities, unless the payment for them is made with the sanction of the Court (*h*); but if the mortgagee enters into possession, he will be liable for repairs and necessities ordered by his authority, and his legal title and actual possession, in that case, render the captain his agent for the purpose of implying such authority (*i*).

Costs of taking possession

If a mortgagee pays necessary expenses in order to obtain possession of the ship, he is entitled to recover the money from the mortgagor or other person liable to pay such expenses (*m*).

In an action to redeem the mortgage of a ship, the expenses of taking and holding possession of the ship are properly chargeable as "just allowances" under Ord XXXIII r. 8, without any direction in the decree for the purpose (*n*).

Right to freight

A mortgagee who takes possession of a ship during a voyage becomes entitled to receive the unpaid freight earned in that voyage (*o*); but the earnings of a ship in the hands of a mortgagee are liable for the expenses of the voyage (*p*).

It was formerly considered that the mortgagee could not recover freight already earned previous to his taking possession (*q*); but the rule now appears to be settled that the mortgagee on taking possession is entitled to all freight then unpaid, whether previously earned or not.

A mortgagee in possession of a ship will not be charged with wilful default for not concurring in a hazardous charterparty (*r*).

What acts amount to taking possession

If the circumstances are such as to prevent a mortgagee from taking immediate possession, it seems that notice to the parties interested, followed by taking actual possession at the earliest opportunity, will be equivalent to possession as from the date of the notice.

(*h*) *Lyons*, 57 L. T. 818

(*i*) *Hubbs v Ross*, L. R. 1 Q. B. 534, and cases there cited, *Rusden v Pope*, L. R. 3 Ex. 269, at p. 272, *Orchis*, 15 P. D. 38, C. A.

(*m*) *Johnson v Royal Mail Co*, L. R. 3 C. P. 38, *Orchis*, 15 P. D. 38, C. A.

(*n*) *Wilkes v Saunton*, 7 Ch. D. 188.

(*o*) *Kenswell v Bishop*, 2 Cr. & J. 529; *Dean v McGhie*, 12 Moo. 185;

Channery v Davidson, 2 Br. & B. 379, *Keith v Burrows*, 2 App. Cas. 636, *Japp v Campbell*, 57 L. J. Q. B. 79.

(*p*) *Green v Biggs*, 6 Ha. 395, *Alexander v Sims*, 5 De G. M. & G. 57.

(*q*) *Channery v Evans*, 1 H. Bl. 117, n.

(*r*) *Samuel v Jones*, 7 L. T. N. S. 760.

So, where the mortgagee of a ship which was proceeding on a voyage gave notice to the mortgagor and the charterer claiming the freight, and took actual possession of the ship on its arrival at the port of destination, he was held to be entitled to the freight earned during the voyage (s).

A mortgagee of a ship on taking possession is not entitled to seize cargo on board belonging to the mortgagor, unless such cargo is included in the security; and cargo will not be included by words of general import, such as "appurtenances" (t)

Right of mortgagee in possession to cargo.

A mortgagee who has taken possession obtains control of the ship, and if the master by order of the mortgagor interferes with such control he will be guilty of misconduct, and no compensation for dismissal can be awarded to him as against the mortgagee (u)

Control of ship

If a mortgagee of a ship is unable to arrest or otherwise obtain possession of the ship, he may, apparently, like any other mortgagee (x), obtain the appointment of a receiver.

Receiver

The statutory power of the mortgagee to arrest and sell the ship arises upon any default of the mortgagor in payment of principal or interest (y), or upon any act or default of the mortgagor imperiling or impairing their security (z), or upon any breach by the mortgagor of the express terms of the mortgage contract. And the mortgagee must be careful to see that his exercise of the power of sale is justified by some such act or default (a), and that it is carried out in accordance with the terms of the statutory power or any stipulation modifying the same (b), otherwise he may be liable in damages.

When mortgagee's power of sale arises

The mortgagee will be entitled to sell the ship free from any contracts entered into by the mortgagor which were subsisting at the time of the mortgage, but of which the mortgagee had no notice, or subsequent contracts which are so inconsistent with the ordinary use of the ship that the mortgagee could not be deemed to have authorized them by leaving the mortgagor in possession, or which are of such a nature as to impair the security (c). It has been seen that a mortgagee will be bound

How far he can sell free from mortgagor's contracts

(s) *Rusden v Pope*, L R 3 Ex. 269

(t) *Langton v Horton*, 5 Beav 9 See *Branches v Molynaux*, 3 Man & Gr 84

(u) *Farrport*, 10 P D 13

(x) *Truman v Redgrave*, 18 Ch D 547

(y) *Wilkes v Saunson*, 7 Ch D 188 see *Cathcart*, L. R 1 A & E 314, 327.

(z) *Collins v Lamport*, 34 L J Ch 196, *Cathcart*, *sup* See also *Blanche*, 6 Asp N S. 272.

(a) *Cathcart*, L R 1 A & E 314.

(b) *Brouard v Dumais*, 3 Moo P C 457.

(c) *Celtic King*, (1894) P. 175

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by contracts entered into by the mortgagor in possession subsequently to the mortgage which are reasonable and proper for the ordinary employment or maintenance of the ship (*d*)

Costs of sale

Where a mortgagee seizes and proceeds to sell a ship under a power, he is entitled to charge the mortgagor with the costs of and incident to the sale (*e*)

iv.—Transfer and Transmission of Mortgages—With regard to the transfer and transmission of mortgages, the Act of 1894 contains the following provisions —

Transfer of mortgage

Sect 37 “A registered mortgage of any ship or share may be transferred to any person, and the instrument effecting the transfer shall be in the form marked C in the first part of the First Schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar shall record it by entering in the register book the name of the transferee as mortgagee of the ship or share, and shall, by memorandum under his hand, notify on the instrument of transfer that it has been recorded by him, stating the date and hour of the record”

Transmission of interest of mortgagee by death, bankruptcy, marriage, &c

Sect 38 —“(1) Where the interest of a mortgagee in a ship or share is transmitted on marriage, death, or bankruptcy, or by any lawful means, other than by a transfer under this Act, the transmission shall be authenticated by a declaration of the person to whom the interest has been transmitted, containing a statement of the manner in which and the person to whom the property has been transmitted, and shall be accompanied by the like evidence as is by this Act required in case of a corresponding transmission of the ownership of a ship or share

“(2) The registrar, on the receipt of the declaration and the production of the evidence aforesaid, shall enter the name of the person entitled under the transmission in the register book as mortgagee of the ship or share.”

v.—Discharge of Mortgage.—The Act enacts as follows as regards the discharge of mortgages —

Entry of discharge of mortgage

Sect 32 “Where a registered mortgage is discharged, the registrar shall, on the production of the mortgage deed, with a receipt for the mortgage money indorsed thereon duly signed and attested, make an entry in the register book to the effect that the mortgage has been discharged, and on that entry being made, the estate (if any) which passed to the mortgagee shall vest in the person in whom (having regard to the intervening acts and circumstances, if any) it would have vested if the mortgage had not been made”

Mistake in entry.

Where the first mortgage is by mistake discharged on the registry, a subsequent registered mortgage has priority (*f*);

(*d*) *Ante*, p 264

(*e*) *Wilkes v Saumon*, 7 Ch. D. 168

(*f*) *Bell v Blyth*, L R 4 Ch. A.

but where the entry of discharge of a mortgage had been made by mistake, and a bill of sale by the mortgagee to a purchaser had consequently been refused, the Court directed the purchaser to be registered (*g*)

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There is no provision which authorizes the registrar to erase entries of mortgages upon their being discharged (*h*).

vi.—Disabilities.—Disabilities are thus provided for by the Act.—

Sect 55 “Where, by reason of infancy, lunacy, or any other cause, any person interested in any ship, or any share therein, is incapable of making any declaration, or doing anything required or permitted by this Act to be made or done in connection with the registry of the ship or share, the guardian or committee, if any, of that person, or, if there is none, any person appointed, on application made on behalf of the incapable person, or of any other person interested, by any Court or judge having jurisdiction in respect of the property of incapable persons, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such act or thing in the name and on behalf of the incapable person, and all acts done by the substitute shall be as effectual as if done by the person for whom he is substituted”

Provision for cases of infancy or other incapacity

On sale of a ship to an infant, the vendor is a trustee for the infant (*i*)

Sect 55 of the Act does not enable the guardian of an infant shipowner to mortgage the ship for repairs, although it may be that, in the exercise of his necessary power to repair, a lien may be created upon the ship (*l*)

vii.—Order and Disposition in Bankruptcy.—If the mortgage of a ship, or any share therein, is duly registered according to the Merchant Shipping Act, 1894 (*l*), the rights of the mortgagee will not be subject to the order and disposition clause of the Bankruptcy Act, 1883 (*m*). By sect 36 of the Act of 1894, it is enacted as follows:—

“A registered mortgagee of a ship or share shall not be affected by any act of bankruptcy committed by the mortgagor after the date of the record of the mortgage, notwithstanding that the mort-

Mortgage not affected by bankruptcy

(*g*) *The Rose*, L R 4 A & E 6, Chasteauvneuf v Capeyron, 7 App Cas 127, J O

918

(*h*) *Chasteauvneuf v. Capeyron*, *sup*
(*i*) *Stapleton v Haymen*, 2 H. & C.

(*k*) *Michael v Frypp*, L R 7 Eq

95

(*l*) 57 & 58 Vict c 60

(*m*) 46 & 47 Vict. c. 52, s. 44 (iii).

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gagor, at the commencement of his bankruptcy, had the ship or share in his possession, order, or disposition, or was reputed owner thereof, and the mortgage shall be preferred to any right, claim, or interest therein of the other creditors of the bankrupt, or any trustee or assignee on their behalf "

Deposit of
registered
mortgages

Where the registered mortgages of vessels were deposited by the mortgagees with their bankers, they were held not to be in the order and disposition of the mortgagees, for an assignment of a mortgage of a ship can only be made by indorsement on the instrument of mortgage (*n*).

Unfinished
ship

As a general rule, an unfinished ship in the builder's yard is not within the clause (*o*)

A mortgage of an unfinished ship registered after the completion and registration of the ship was held to prevail against the trustee in bankruptcy of the owner of the ship (*p*)

SECTION II.

MORTGAGES OF FREIGHT.

Meaning
of term
"freight "

Freight is the sum paid by a merchant or other person chartering a ship or part of a ship, or sending goods in a general ship for the use of such ship or part, or the conveyance of such goods during a specified voyage or for a specified time (*q*)

Meaning
of term
"charter-
party "

A charterparty is an agreement in writing by which a ship-owner agrees to let a ship or part of a ship for the carriage of goods on a specified voyage, or for a specified time, for a sum of money agreed to be paid for their carriage (*r*).

How freight
is fixed

If there is no charterparty, the freight is usually fixed by the bill of lading, but if no freight is expressly agreed upon, the fact that the goods were laden on a ship to be conveyed will raise an implication in law of a contract by the owner of the goods to pay for the carriage, the liability being controlled by the special custom of the trade (*s*)

(*n*) *Lacon v Liffen*, 32 L J Ch

315

(*o*) *Holderness v Rankin*, 2 De G F & J 258, *Exp Watts*, 3 De G J & S 394, *Swainston v Clay*, 4 Giff 187, varied on appeal, 3 De G J & S. 558, *McBain*, app, *Wallace*, resp., W N. (1881) 127, H. L

(*p*) *Bell v. Bank of London*, 3 H & N 730

(*q*) Wharton's Law Lex (6th ed) 409

(*r*) *Ibid* 171

(*s*) *Domett v Beekford*, 5 B & Ad. 521.

Freight is not earned until the cargo is ready to be delivered to the consignee at the appointed place (*t*), in the absence of express stipulation to the contrary (*u*)

CHAPTER XV
When freight is earned

It has been seen that a mortgage of a ship does not pass the right to the freight to the mortgagee until he takes possession. The freight, if in a charterparty, may be assigned independently of the ship, and will not be within the Registry Acts, and the Courts will grant an injunction to prevent payment to the mortgagor (*x*). And though the ship and freight were included in one contract, it might have been good as to the freight, though bad as to the ship (*y*)

Separate assignment of freight

The future earnings can be assigned, and will be good against the trustee in bankruptcy, at least if the earnings are due before the bankruptcy (*z*). A general assignment of all the future earnings of a ship, which might for ever separate the ship and freight, though for security of a debt, was held to be bad in *Robinson v. Macdonnell* (*a*). But in *Douglas v. Russell* (*b*), Lord Brougham, C., held otherwise; in that case, however, the ship had been previously assigned to the same parties (*c*). An assignment of a ship, with all its future freight, earnings, and cargo, by way of security, is clearly valid (*d*); and *a fortiori* the assignment of a ship and the freight to be earned during a particular voyage (*e*).

Assignment of future freight

The right to the freight is incidental to the ownership, and can be originally dealt with only by the owner of the ship (*f*); and a mortgage of freight by the owner will bind a subsequent mortgagee of the ship who has notice of the prior charge; but where the owner of a ship assigned the freight not yet earned, and three days afterwards, with the knowledge of the assignee, mortgaged the ship to the defendants, who registered their mort-

Relative rights of respective mortgagees of ship and freight.

(*t*) *Cato v. Irving*, 5 De G. & S. 210, *Brown v. Tanner*, L. R. 3 Ch. A. 597. See *Bright v. Couper*, 1 Brownl. 21, *Mullen v. Young*, 5 E. & B. 7, 755, *Sanders v. Fanczeller*, 4 Q. B. 277, 291, *Castel and Latta v. Trechman*, 1 C. & E. 276. See *Tunbull v. Great Eastern and Peninsular Navigation Co.*, 1 C. & E. 595.

(*u*) As to the right to freight of the mortgagee of a ship, see *ante*, p. 266.

(*x*) *Mestaer v. Gillespie*, 11 Ves. 637, *Gardner v. Lachlan*, 4 My. & Cr. 129.

(*y*) *Mestaer v. Gillespie*, *sup.*, *Davenport v. Whitmore*, 2 My. & Cr. 177.

(*z*) *Leslie v. Guthrie*, 1 Bing. N. C. 697, *Gardner v. Cazenove*, 26 L. J. Ex.

17, *Bulcher v. Capper*, 4 Man. & Gr. 502. See also *Taithy v. Official Receiver*, 13 App. Cas. 523, 513.

(*a*) 5 M. & S. 228, *Speldt v. Lechmere*, 13 Ves. 538.

(*b*) 3 My. & K. 488. But see *The Ship Haine*, 8 Pri. 269, n.

(*c*) See *Douglas v. Russell*, 4 Sim. 535, where the facts are stated.

(*d*) *Curtis v. Auber*, 1 J. & W. 526, *Gibson v. Inge*, 6 Ha. 112, *Lindsay v. Gibbs*, 22 Beav. 522.

(*e*) *Langton v. Horton*, 1 Ha. 549.

(*f*) *Morrison v. Parsons*, 2 Taunt. 407, *Lindsay v. Gibbs*, *sup.*, *Willis v. Palmer*, 6 Jur. N. S. 732.

CHAPTER XV

gage, the assignee having neglected to give notice of his claim upon the freight to the mortgagees, it was held that the assignee was not entitled to set up any right to such freight in opposition to the rights of the mortgagees (*g*)

Notice of
prior charge
including
freight

Where ship-brokers made advances for a ship's use, thereby obtaining a lien on the freight, with notice of a mortgage of the ship by an indorsement on the certificate of registry, and such mortgage was, in fact, a mortgage not only of the ship, but also of the freight, it was held that their lien must be postponed to the claim of the mortgagee to the freight, though he did not take possession of the ship till the completion of the voyage (*h*)

Priorities as
between
mortgagees of
ship and of
freight

The first registered mortgagee of a ship by taking possession obtains a legal right to receive all freight not completely earned, in priority to a mortgagee of freight, of which he has no notice at the time (*i*), and he may tack to the amount due on his mortgage the amount of any subsequent charge which he may have acquired on the freight in priority to any mesne charge on the freight specifically of which he had no notice; and it makes no difference that the mesne incumbrancer was the first to give to the charterer notice of his charge on the freight (*l*). But a mortgagee of freight will not be postponed to a subsequent second mortgagee of the ship, inasmuch as the interests of both are equitable, and must generally rank in priority of date (*l*).

Notice to be
given to
mortgagee
of ship

A mortgagee of freight, as he cannot complete his title by taking possession, should give notice of his charge to the registered mortgagee of the ship, and any other incumbrancer of whom he has notice, as well as to the charterer

(*g*) *Wilson v Wilson*, L R 14 Eq

32, *Rusden v Pope*, L R 3 Ex 272

(*h*) *Gibson v Ingo*, 6 Ha 112

(*i*) *Brown v Tanner*, L R. 3 Ch

A 597

(*l*) *Liverpool Marine Credit Co v*

Wilson, L R 7 Ch A 507

(*l*) *Ibid* at p 511

SECTION III

CHAPTER XV

MORTGAGES OF CARGO.

A mortgage of a ship, either *simpliciter* or "with the appurtenances," will not pass to the mortgagee the cargo, unless expressly included in the security (*m*). Even in the case of a whaling ship, when the cargo constitutes the whole earnings of the ship, an assignment of the ship "with its appurtenances" will not pass to the mortgagee, as of the nature of freight incident to the employment of the ship, the cargo of oil gained during the adventure (*n*).

Mortgagee of ship not entitled to cargo

In the absence of any special agreement to the contrary, the cargo belongs to the mortgagor, who may assign it independently of the ship, and such assignment will not require registration either under the Merchant Shipping Act (*o*), or under the Bills of Sale Acts (*p*).

Mortgage of cargo does not require registration

An assignment may be made of a future cargo, which will be valid, and such title will not be affected by a subsequent execution by a judgment creditor, at all events if due diligence is used to complete the title by notice (*q*).

Mortgage of future cargo

The master is intrusted with the cargo for the sole purpose of taking reasonable care of it and conveying it to its destination, and is bound to make every possible exertion to accomplish that purpose (*r*). A duty is cast on him, in many cases of accident and emergency, to act for the safety of the cargo in such manner as may be best under the circumstances in which it may be placed, and, as a correlative right, he is entitled to charge its owner with the expenses properly incurred in so doing (*s*). He has no power to sell or mortgage the cargo or any part thereof except under the pressure of severe consummate distress (*t*) either of the ship, as when the master has no other means of procuring supplies or repairs, or of the cargo, as where it lies perishing at some intermediate port. It is not sufficient to prove that the master was doing the best for all concerned (*u*). Though

Master's power over cargo

(*m*) *Alexander v Summs*, 5 De G M. & G 57

(*n*) *Langton v Horton*, 5 Beav. 9

(*o*) *Ibid*

(*p*) 41 & 42 Vict c 31, s. 4

(*q*) *Langton v Horton*, 1 Ha. 549.

See *Bryan v Nix*, 4 M & W 775

(*r*) *Notara v Henderson*, L R 7 Q B 225

(*s*) *Tronson v Dent*, 8 Moo P C 419, *Notara v Henderson*, *sup*, *Australasian Navigation Co v Morse*, L R 4 P C 222, *Cargo ex Argos*, L R 5 P C 165

(*t*) *Gratitudine*, 3 C Rob Adm 240

(*u*) *Tronson v Dent*, 8 Moo P C 419, *Acatos v Burns*, 3 Ex D 282, *Atlantic, &c Co v Huth*, 16 Ch D 481, C A

CHAPTER XV

Notice to
master

the ship is a wreck, and the cargo on the wreck, still he has no power to sell the cargo if he can store it (x).

A mortgagee of cargo should, immediately upon the execution of the mortgage, give notice thereof to the master of the ship. Where mortgagees of cargo did not send notice of their mortgage till two months after the date of the deed, so that such notice was not received by the master till after the mortgagor had become bankrupt, and it appeared that there were means of earlier communication, it was held that the cargo was in the reputed ownership of the mortgagor at the commencement of the bankruptcy (y).

Bottomry
bonds and
respondentia.

Hypothecations of cargo, otherwise than by way of mortgage, will be considered in a subsequent chapter (z).

(x) *Cannell v Sewall*, 3 H & N 617, *Eubank v Nutting*, 7 C B 777, *Notara v Henderson*, L R 7 Q B 227, *Acuto v Burns*, 3 Ex D 290, *Atlantie, &c Co v Hutch*, 16 Ch D 481, C A.

(y) *Exp Lucas, Re Givre*, 3 De G & J 113. See *Acraman v Bates*, 6 Jur N S 294. See further, as to reputed ownership, *ante*, pp 177 *et seq*.
(z) *Post*, Chap LXIV sect II, pp 1494 *et seq*.

CHAPTER XVI

OF MORTGAGES OF STOCK AND SHARES.

SECTION I.

MORTGAGES OF STOCK

SIR WILLIAM GRANT, when M. R., justly remarked that public stocks or funds are, in fact, *perpetual annuities* granted for ever, redeemable by the public; that they are a mere right, and the circumstance that government is the debtor makes no difference; and that they constitute a mere demand of dividends as they become due, having no resemblance to a chattel moveable or coin-money capable of possession and manual apprehension. He determined that if stock be transferred into the name of a married woman, and her husband die in her lifetime, without having accepted the stock in the bank books, or otherwise reduced it into possession, the stock will survive to the wife, although the husband and wife should in his lifetime have signed partial transfers of the stock (a).

Stocks are
perpetual
annuities

In another case (b) the M. R. remarked, there was a very untechnical expression used with regard to stock; there is literally no such thing as one hundred pounds stock: knowing, however, that in common parlance people, speaking of stock, will so express themselves, the Court will apply it.

Stock in the public funds is transferable by the stockholder in person, or under the authority of a letter of attorney, according to the form prescribed by the Bank of England

How stock is
transferred

Express powers were not formerly necessary in mortgages of stock, or in the instruments of defeasance executed by the transferee; nor need a mortgagee of stock now rely on his statutory power in order to realize his security by sale.

Power of sale.

(a) *Widdaman v. ...*, 9 Ves. (b) *Kirby v. Potter*, 4 Ves. 748, 751.

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If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself principal and interest, without any authority from the mortgagor, and without commencing an action of foreclosure (*e*) The rule is founded on considerations of mercantile usage and convenience But the mortgagee will be decreed to account for the surplus (*d*) He may, however, foreclose if he prefer it, and that, too, although an express power of sale is given him by the mortgage deed, and whether his interest be legal or equitable (*e*); and the mortgagee of a reversionary interest in stock may have foreclosure if he desire that remedy (*f*)

Misdescription

Where reversionary stock was described as 3,000*l* when really 5,000*l*, only 3,000*l* passed (*g*)

SECTION II

MORTGAGE OF SHARES IN A COMPANY.

Mortgagee whether liable for unpaid calls

i.—Introductory Remarks—Where, by the rules of a company, shares are not to be transferred until all arrears of calls are paid, it would seem that a mortgagee by transfer cannot be recognized as transferee until payment of all arrears, but if the company recognize him as such, they cannot call upon him to pay the arrears (*h*)

When mortgagee is liable as a contributory

Where shares in a joint stock company are transferred as security for a debt, the transferee is in the position of legal owner of the shares, and becomes liable as a member to be placed on the list of contributories on the winding-up of the company (*i*). But an equitable mortgagee, in whose name the shares have not been registered, is not a contributory, nor will the register be rectified by the insertion of his name (*h*), but if

(*e*) *Tucker v Wilson*, 1 P Wms 261, 483
Lochwood v Euer, 2 Atk 303

(*d*) *Harrison v Hart*, Comyns, 393,
Langton v Waste, L R 4 Ch A 492

(*e*) *Slade v Rigg*, 3 Ha 35

(*f*) *Slade v Rigg*, *sup*, *Wayne v Hanham*, 9 Ha 62, *Stamford, &c Banking Co v. Ball*, 4 De G F & J 310

(*g*) *Woodburn v Grant*, 22 Beav

483

(*h*) *Watson v Eales*, 23 Beav 294

(*i*) *Re Land Credit Co of Ireland*, L R 8 Ch A 831 See *Re Anstrut Banking Corporation*, L R 4 Ch A 252, *Re Patent Paper Manufacturing Co*, L R 5 Ch A 294

(*k*) *Newry Rail Co v Moss*, 14 Beav 64, *Re Joint Stock Discount Co*, L R 3 Ch A 119

shares which have been deposited with creditors are exchanged by them for shares in their own names, they are liable as contributories, though known to the company as holding the shares on security only (*l*)

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Where shares may be forfeited if debts due by the holder are not paid, or where the holder cannot transfer the shares until the debts are paid, the debts are not charged on the shares (*m*)

Where the holder cannot transfer shares until debts due to the company are paid, any debt will prevent the transfer, although it has nothing to do with the shares (*n*).

ii.—How Mortgages of Shares are effected—Mortgages of fully paid up shares in joint stock companies are usually effected by a transfer of the shares to the mortgagee duly registered, accompanied by a deed of defeasance. If, however, the shares are not fully paid up it will generally be more prudent for the mortgagee not to take a complete registered transfer to himself, and so incur the liabilities of a shareholder (*o*). In such a case the mortgagee should require the certificates to be delivered to him, and also take a transfer to himself executed only by the mortgagor, which the mortgagee can at any time render complete by executing it himself and registering it

A valid security may be made by a deposit of the certificates of shares; and such security will apparently operate as a mortgage by deposit of documents of title and not as a pledge of the shares (*p*).

Deposit of certificates

Although the company are not bound to see to the execution of trusts, still it is important that notice should be given to the company of any charge upon shares, in order that the mortgagee, by giving such notice, may protect himself against any lien claimed by the company in respect of the mortgaged shares (*q*).

Notice to company of charge on shares

A transfer of shares must be in the form prescribed by the statute or by the regulations of the company; and the company

Form of transfer of shares.

(*l*) *Price and Brown's Case*, 3 De G. & S. 147

(*m*) *Re Dunlop*, 21 Ch. D. 583, C. A.

(*n*) *Exp Stringer*, 9 Q. B. D. 486, C. A.

(*o*) *Neury Rail. Co v Moss*, 14 Beav. 64, *Re Land Credit Co of Ireland*, L. R. 8 Ch. A. 831.

(*p*) *Exp Moss*, 3 De G. & S. 599, *Exp Stewart, Re Shelley*, 4 De G. J. & S. 543, *Bunney v. Ince Hall Coal Co.*, 35 L. J. Ch. 363, *Re Tahiti Cotton Co*, *Exp Sargent*, L. R. 17 Eq. 273, *Colonial Bank v Whinney*, 11 App. Cas. 426. See *infra*, p. 279

(*q*) See *post*, p. 1271.

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may refuse to register transfers not according to the prescribed form (r) Unless required by the regulations, a transfer of shares in a company governed by the Companies Act, 1862, need not be under seal (s) By the Companies Clauses Consolidation Act, 1845, transfers of shares and stock of companies incorporated for carrying on undertakings of a public nature are required to be by deed (t)

Transfer by
delivery

The Companies Act, 1867 (u), empowers companies to issue, with respect to fully paid up shares and stock, share warrants to bearer transferable by delivery, the effect of which warrants is to entitle the bearer to the shares or stock specified therein, and the shares or stock may be transferred by delivery of the warrants Except under the provisions of this Act, there appears to be no power to issue shares transferable by delivery (x)

Transfers in
blank

If the shares are not fully paid up, and consequently the transfer is not registered, it has been a frequent practice for the mortgagee to take either a transfer in blank, or a mere deposit of the shares, together with a power of attorney to execute a transfer in the name of the mortgagor; the mortgagee's name would thus not appear on the register, and he would be enabled to transfer the shares directly to a purchaser. This practice is, however, attended by certain inconveniences and risks

Transfers
under seal

Where, however, by the regulations of a company, transfers of shares must be by deed, the blanks in a transfer cannot be filled up so as to entitle the transferee or his assignee to be registered as holder, unless the transfer is re-executed and re-delivered by the transferor (y).

So, where the certificate of trust stock, together with a deed of transfer, were given by a trustee to his bankers to secure his own overdraft; the deed was signed, sealed, and delivered by the trustee, but the name of the transferee was left in blank, the bankers subsequently filled in their own names as transferees and, holding the certificates, were registered as owners; it was held that the transfer, not having been executed to the bankers

(r) *Re General Cemetery Co*, 6 E & B 415

(s) *Re Tahiti Cotton Co, Ex p Sargent*, L. R. 17 Eq 273 See also sects. 14, 15 of the Companies Clauses Act, 1845, as to the transfer of shares in companies governed by the Act

(t) 8 & 9 Vict c 16, s 14

(u) 30 & 31 Vict c 131, ss 27, 28.

(x) See *Re General Co for Promotion of Land Credit*, L. R. 5 Ch A 363, affirmed in D. P., sub nom *Princess of Reuss v. Bos*, L. R. 5 H L 176, *McEwen v. West London Wharves Co*, L. R. 6 Ch A 655

(y) *Société Générale de Paris v. Waller*, 11 App Cas 20

as transferees, did not pass to them the legal estate in the shares, and accordingly that the prior equity of the *cestui que trusts* prevailed (z)

Transfers not under seal

Where transfers may be by writing not under seal, the taking of transfers in blank is attended with serious risks to all parties concerned. The transfers may come, by being stolen or otherwise, into the hands of a stranger, who may fill in the blanks in his own name, and sign the transfers, and dispose of them to a *bonâ fide* purchaser without notice, in which case either the mortgagee or the company must bear the loss, according to the circumstances of the particular case.

On the other hand, the mortgagor runs the risk of improper dealing with the transfer by the mortgagee. The person who has signed a negotiable instrument in blank, or with blank spaces, is estopped from disputing any alteration made in the document after it has left his hands, by filling up blanks or otherwise, in a way not *ex facie* fraudulent, as against a *bonâ fide* holder without notice (a), unless the circumstances of the case are such as to put such holder on inquiry at the time he took the transfer (b). These principles appear to apply not only to negotiable instruments, but to all cases where the person taking property can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so (c).

Notice of a mortgage of shares by assignment in blank is binding on a company (d).

iii.—Effect of Deposit of Certificates.—The question has sometimes arisen whether a delivery of certificates of shares by way of security operates as a pledge of the shares or as an equitable mortgage by deposit of the documents of title to the shares. The distinction was formerly of considerable importance in view of the difference between the remedies incident to the two kinds of contract; for, as will be seen hereafter, the remedy of a pledgee is to sell the property, but the proper remedy of an equitable mortgagee was foreclosure. No doubt the practical

Whether a deposit of certificates of shares operates by way of pledge or equitable mortgage

(z) *Powell v London and Provincial Bank*, (1893) 2 Ch 555, C A

(a) *France v Clark*, 26 Ch D 257, at p 262. See *London Joint Stock Bank v Simmons*, (1892) A C 201, at p 215; *Fox v Martin*, W N (1895) 36

(b) *Earl of Sheffield v London & Joint*

Stock Bank, 13 App Cas 333, *Colonial Bank v Cady and Williams*, 15 App Cas 267.

(c) *Colonial Bank v. Whimney*, 15 App Cas. at p 235, *London Joint Stock Bank v Simmons*, (1892) A C 201

(d) *Exp Dobson*, 6 Jur 917.

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importance of this question is, in the generality of cases, considerably reduced, by reason of the jurisdiction of the Court to order a sale in lieu of foreclosure which will be exercised, almost as a matter of course, at the instance of the mortgagor (*e*) The remedy of the deposittee of share certificates is thus, generally speaking, by sale, whether he be regarded as pledgee or mortgagee, and even if he were deemed to be pledgee, though a right of immediate sale on default (*f*) is incident to the contract of pledge, a deposittee of shares cannot carry out the sale without the aid of the Court unless the deposit is accompanied by a transfer of the shares

Cases may, however, arise in practice where, by reason of depreciation in the value of shares, it would be manifestly to the advantage of the deposittee that he should be treated as mortgagee, for, in such a case, an order for sale would be to the detriment of the mortgagor, and the mortgagee might desire to obtain an order for foreclosure, which would prevent the mortgagor from claiming to redeem the shares when they should rise in value The question will therefore be here briefly considered

Whether
shares can be
pledged

In considering what things may be the subject of pledge, Mr Justice Story says (*g*) that, at common law, choses in action, debts, and shares in companies may be pledged, but points out (*h*) that, by the Roman law, such property being incapable of any delivery, is not, strictly speaking, the subject of pledge. It seems, however, difficult to accept the alleged rule of common law laid down by the learned author without some reserve as regards shares in companies, for symbolical delivery, it is submitted, is, at common law, only effectual where, from force of circumstances, it has become impossible or inconvenient to deliver what otherwise admits of actual delivery, and not where the thing itself is inherently incapable of delivery (*i*)

In the first place, it has been repeatedly held that where there is a deposit of certificates of shares by way of security, accompanied by the execution by the borrower of a complete legal transfer of the shares or of a transfer in blank which the lender can complete by filling in the name of the transferee, the transaction is to be regarded as a mortgage entitling the deposittee

(*e*) 44 & 45 Vict. c 41, s 25, considered *post*, p 1017

(*f*) *Post*, p 1470

(*g*) Story, *Bailments*, s 290

(*h*) *Ibid*, s 290 a

(*i*) *Ryall v Rolfe*, 1 Atk 164, at p. 166

of the certificates on default to foreclose the shares, or to an order for sale in lieu of foreclosure.

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In *Re Tahiti Company, Ex parte Sargent* (k), certificates of shares and blank transfers thereof were deposited by way of security for a loan, and were afterwards again deposited to secure a debt of a greater amount than the original loan. It was held by Jessel, M. R., on the ground that every mortgagee has a right to re-borrow and to transfer his security, that the original borrower could not redeem the shares without paying to the sub-depositee the whole amount of the debt due to him from the original lender. Had the learned judge considered the deposits to have been strictly by way of pledge instead of by way of equitable mortgage by deposit, it seems that the case must have been decided differently.

Deposit of
certificates
by way of
security
accompanied
by transfer

In the later case of *France v Clark* (l), in which certificates of shares and blank transfers were deposited and redeposited as in the last case, it was held by Fry, J., that the original borrower was entitled to redeem on payment of the advance made to him, on the ground that the authority of a pledgee to sub-pledge is limited by the terms of the pledge under which he has possession. The Court of Appeal, however, though they arrived at the same conclusion, preferred to base their decision upon the ground that the form of the assignment in blank was of itself sufficient notice of a prior title, even if the original lender was regarded "in the light of an equitable mortgagee, which he certainly was" (m).

Where railway shares were transferred, together with the certificates, to secure an advance, it was held that the lender was not in the position of a mere pledgee, but was entitled to foreclosure (n). Holders of debentures comprising uncalled capital were in a recent case held similarly entitled (o).

It may be observed that, in several recent cases (p), deposits of certificates and blank transfers of shares, though admittedly not negotiable (q), have been referred to in judgments as pledges. In all of these cases, however, the question to be decided was one of title, and the underlying principle of the

(k) L. R. 17 Eq. 273.

(l) 22 Ch. D. 830.

(m) 26 Ch. D. 257, 262, C. A.

(n) *General Credit and Discount Co. v Glegg*, 22 Ch. D. 549.

(o) *Sadler v Worley*, (1894) 2 Ch. 170.

(p) *Re Tahiti Cotton Co., Ex p. Sargent*, L. R. 17 Eq. 273; *Colonial Bank v Cady and Williams*, 15 App. Cas. 267, *Bentinch v London Joint Stock Bank*, (1893) 2 Ch. 120.

(q) *Colonial Bank v Cady and Williams*, *supra*, at p. 272.

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decisions in each case was that "if the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value" (r). This equitable principle, though applicable to the transaction of mortgage, is not applicable to "pledge" in the strict sense of the word, to which the maxim "*caveat emptor*" still applies in ordinary cases (s). It is submitted, therefore, that the expression "pledge" in the cases above referred to is used in a broad and popular sense rather than in a strictly technical sense, which is the more likely, as in none of those cases did any question as to the proper remedy of the deposittee arise apart from the question of title, so that the distinction between mortgage and pledge does not appear to have been necessary to the decisions.

Deposit of
negotiable
instruments

On the other hand, it is settled that a marketable or negotiable instrument may be the subject of pledge, and, accordingly, it was held that a deposit of Canada railway bonds did not confer on the holder a right to foreclosure (t). And the same principle would seem to apply to a deposit of instruments which are not, strictly speaking, marketable or negotiable, as debentures or share warrants to bearer.

Simple deposit
of certificates
of shares
without
transfer

Where there is a simple deposit of certificates of shares passing by transfer unaccompanied by any transfer, it would seem that the deposit will operate like a deposit of title deeds of land, and be deemed to give a right to a legal transfer of the shares carrying with it the remedies incident to a mortgage.

So where a deposit of shares was made with bankers as a security for an advance, but no written memorandum was made, the borrower having become bankrupt, it was held that the proper remedy of the bankers was to apply to the Court to have the shares realized, as in the case of a deposit with a written memorandum, and they were accordingly allowed the costs of such application (u).

Again, where directors of a company deposited their shares with a bank to secure an advance to the company, and one of

(r) *Colonial Bank v Cady and Williams*, 15 App Cas 267, at p 285

(s) See as to this rule, as applied to pledges of goods, *post*, pp 1462 *et seq*

(t) *Carter v Wake*, 4 Ch D 605. As to what are marketable securities, see *Stern v Reg*, (1896) 1 Q B 211, and cases there cited

(u) *Exp Moss*, 3 De G & S 599

the directors became bankrupt, the transaction was treated as one of equitable mortgage, and accordingly decided in favour of the bank as against the bankrupt's assignees, on the ground that the company had constructive notice of the deposit (x).

In one case, where share certificates were deposited with a bank as security, accompanied with a blank transfer, which was inoperative as a transfer, and where, the borrower having become bankrupt, it was held that the shares were not in his order and disposition as reputed owner, the transaction was, throughout the judgments of the learned lords who decided the case, referred to as a pledge, but the use of the words "equitable title of the pledgee" and other expressions, seem to indicate that the terms "pledge" and "pledgee" were not used in a strictly technical sense, and that, if any necessity had arisen for taking into account the distinction between a pledge and a mortgage, the transaction would have been treated as one of equitable mortgage by deposit (y)

(x) *Exp Stewart, Re Shelley*, 4 De G J & S 543

(y) *Colonial Bank v. Wharmby*, 11 App Cas 426

CHAPTER XVII

OF MORTGAGES OF POLICIES OF LIFE ASSURANCE

Mortgages
of policies
coupled with
life interests
in realty or
personalty

i.—Introductory Remarks.—Mortgages of policies of life assurance are generally given as collateral securities, and, as such, are of great value when coupled with a life interest in real or personal property, so as to provide a fund for payment of interest and premiums. But, unless accompanied by a security upon property yielding an immediate income adequate to such payments, a mortgage of a policy is obviously a precarious and ineligible security, inasmuch as it requires periodical payments for its maintenance which must be made by the mortgagee if the mortgagor fails to do so; also, it yields no income, and in the first instance it is of little value for purposes of sale, though its value increases in proportion as it has been long effected, especially if, by the terms of the policy, the insured becomes in course of time entitled to accretions of bonus, or reduction of premiums.

Company not
chargeable
with interest
on policy
moneys

A further disadvantage attending mortgages of policies is that, upon the death of the assured, the assurance company may be justified in refusing to pay over the policy moneys to the mortgagee till satisfied on points which may arise; in which case the company is not chargeable with interest on the policy moneys, unless they have been guilty of default or undue delay.

Where a policy of life assurance was deposited by way of equitable mortgage, and, on the death of the assured, the mortgagee did not take out administration, but an order was made dispensing with the legal personal representative of the assured, and directing payment of the policy moneys, which were insufficient to satisfy the amount due under the mortgage, to the mortgagor, it was held that interest on the policy moneys did not begin to run until the order for payment was made (*a*).

(*a*) *Webster v. British Empire Mutual Life Assurance Co*, 15 Ch D 169, C A.

Where a mortgage is effected by a tenant for life, or on an estate depending upon lives, it is usual to insure the lives of the *cestui que vie* as a further security; but in the absence of any such stipulation the Court cannot compel the mortgagor to insure the lives (b).

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Court cannot compel insurance

Where a mortgagee of leaseholds for lives insures one of the lives, the insurance moneys will not be applied in part redemption, but may be held as compensation for the loss to his security by the dropping of the life (c).

Insurance of lives on which leases depend

Policies are, however, often mortgaged by themselves. A policy is a security which can be given by those who have no other to give, by men in business, who can afford to pay interest and premiums for the use of capital, or by persons who, like beneficed clergymen and officers on half-pay, are in receipt of an assured income during their lives, which they cannot legally pledge to an incumbrancer (d). When policies are mortgaged alone, the concurrence of sureties in the transaction is often required for the purpose of guaranteeing the payment of the interest and premiums, and, sometimes, of the principal.

Mortgages of policies alone

Securities of this kind are affected by the death of the assured by the hands of justice (e), or by suicide when sane (f).

Where the policy is to be void if the assured "died by his own hands," all acts of voluntary self-destruction are included, and the clause is not limited to acts of felonious suicide (g).

Policy invalidated by suicide of the assured

A policy may contain a stipulation that it shall be valid to the extent of the interest of any *bonâ fide* assignee, notwithstanding that the assured should commit suicide (h). And where a policy containing a stipulation to this effect was mortgaged with other property for a sum exceeding the amount of the policy, and the assured committed suicide (during a fit of temporary insanity), it was held that the payment of the sum assured to the mortgagee did not give the insurance company

Stipulations in favour of bonâ fide assignee

(b) *Grantley v Garthwaite*, 6 Madd 96

(c) *Mulliken v Kidd*, 4 Dr & War 274

(d) *Dav Conv* vol 11 pt 2, p 122

(e) *Amicable Soc v Bolland*, 4 Bl N S 194

(f) *Moore v Woolsey*, 4 E & B 251. But it would seem that suicide by an insane person would, in the absence of express stipulation to the contrary, invalidate a policy on his life. See *Horne v Anglo-Australian*,

Gr Co, 7 Jur N S 673, *Borrodale v Hunter*, 5 Man & Gr 639, *Clift v Schwabe*, 3 C B 437, 481, n., *Dufaur v Professional Life Ass*, 25 Beav 599.

(g) *Borrodale v. Hunter*, 5 Man & Gr 639, *Clift v Schwabe*, 3 C B 437, 481, n.

(h) *Moore v Woolsey*, 4 E & B 254, *Cook v Black*, 1 Ha 390, *Dufaur v Professional Life Ass. Co.*, *sup*, *Jones v Consolidated Investment Co*, 26 Beav 256.

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any equity against either the property comprised in the mortgage or the estate of the assured, neither the doctrine of marshalling nor that of principal and surety being applicable to such a case (i)

Who is an assignee

A deposit and agreement to assign, or a mere letter charging the policy with a floating balance, is a sufficient assignment within this clause; and notice need not be given to the office (k)

Protection of interests of third party

Where the terms of the condition were, that a third party should, notwithstanding that the assured might commit suicide, be indemnified out of the sum assured to the extent of his interest, an inquiry was directed whether he had any securities for his debt other than the policy in order to ascertain such interest (l)

A stipulation to take effect in case of the suicide of the assured, "if any third party have acquired a *bond fide* interest by assignment or by legal or equitable lien for a valuable consideration, or as security for money," does not apply in favour of the trustee in bankruptcy of the assured (m)

Where an insurance company advanced money on the security of a policy effected in their office, and containing such a stipulation, the company was held to be a "third party" within the meaning of the stipulation; the condition being intended for the benefit of the assured in order to render the policy an available security (n).

Effect of misrepresentation

The validity of a security on a policy of assurance may be affected by misrepresentations of the assured as to health or age at the time when the policy is effected, even although the fact may be immaterial (o)

It is of great importance, therefore, that the mortgagee of a policy of assurance should ascertain that no misrepresentation or suppression of facts was used in effecting the policy, and also, if the policy is not in the name of the *cestui que vie*, that the assured had an insurable interest at the date of the policy

As to interest requisite to

ii —What Insurable Interest is necessary to support a Policy —

(i) *Solventers and General Life Assurance Society v Lamb*, 2 De G J & S 251, *City Bank v Sovereign Ass*, W N. (1884) 61

(k) *Cook v Black*, 1 Ha 390, *Dufaur v Professional Life Ass Co*, 25 Beav 599, *Jones v Consolidated Investment Co*, 26 Beav 256

(l) *Cook v Black*, 1 Ha 390

(m) *Jackson v Foster*, 1 E & E 463

(n) *White v The British Empire Mutual Life Assurance Co*, L R 7 Eq 396

(o) *Anderson v Fitzgerald*, 4 H L C 484, *Casenove v British Equitable Insurance Co*, 29 L J C P 160, *Thomson v Weems*, 9 App Cas 671

The statute 14 Geo III c 48, prohibits insurances to be made by persons having no interest in the event insured; by that Act it is enacted as follows.—

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support a policy of life assurance

Sect 1 "That no insurance shall be made by any person or persons, bodies politic or corporate, on the life or lives of any person or persons, or any other event or events (*p*) whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, as by way of gaming or wagering, and that every insurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

No insurance to be made on lives, &c, by persons having no interest

Sect 2 "That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person's or persons' name interested therein, or for whose use or benefit, or on whose account, such policy is so made or underwrote."

No policies on lives without inserting the names of persons interested

Sect. 3. "That, in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events."

How much may be recovered where the insured has interest in lives

Sect. 4 provides that the Act shall not extend to insurances *bonâ fide* made on ships, goods, or merchandizes (*q*).

Extent of Act

It is a question whether this Act applies to benefit insurance societies formed under the Friendly Societies Acts (*r*).

Benefit insurance societies

The interest necessary to support a policy must be a pecuniary interest (*s*).

Interest must be pecuniary

Of course, a person effecting an assurance on his own life has an interest sufficient to give validity to the policy (*t*).

Insurance of person's own life

It has been held that a wife has an insurable interest in the life of her husband (*u*). And by the Married Women's Property Act, 1882 (*x*), it is provided that a married woman may effect a policy upon her own life or the life of her husband for her separate use, and the same and all benefit thereof shall enure accordingly; and a husband may effect a policy on his own life expressed to be for the benefit of his wife, and, in the absence

Insurance of life of husband by or for benefit of wife

(*p*) See, as to what transactions are within the statute, *Roebuck v Homer-ton*, Cowp 737, *Good v. Elliott*, 3 T R 693, *Paterson v Pouell*, 9 Bing 320, *Morgan v Febrâr*, 4 Sc 230

(*q*) See as to such policies, 28 Geo III c 56

(*r*) *Brown v Freeman*, 4 De G. & S 444

(*s*) *Halford v Kymer*, 10 B. & Cr

724, *Hebden v West*, 3 B & S 579, *Barnes v London, Edinburgh and Glasgow Life Assurance Co*, (1892) 1 Q B 864

(*t*) *Wainwright v Bland*, 1 Moo & R 481

(*u*) *Reid v. Royal Exchange Assurance Co*, Peake's Add Cas 70.

(*x*) 45 & 46 Vict c 75, s 11 See post, p 338

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Insurance of
life of wife
for benefit
of husband

of fraud, the policy will create a trust for her so as not to form part of his estate or be liable for his debts.

It has been, however, held that a husband has not an insurable interest in the life of his wife (*u*), and there is no statutory provision enabling a husband to insure her life for his own benefit; but by the Married Women's Property Act, 1882 (*x*), she may effect a policy on her own life expressed to be for the benefit of her husband, in like manner as a husband may for the benefit of his wife

Insurance of
life of parent
for benefit of
child

A parent has not an insurable interest in the life of a child (*y*); nor apparently has a child an insurable interest, within the statute of Geo III, in the life of its parent, but by the Married Women's Property Act, 1882 (*x*), a father or mother may effect a policy on his or her own life for the benefit of a child or children

Expectancy

The mere expectancy of an heir or next of kin does not give an insurable interest (*z*)

Insurable
interest of
trustee

An interest as trustee has been held to be sufficient to support the validity of a policy (*a*)

Insurable
interest of
creditor in
life of debtor.

It is settled that a creditor has an insurable interest in the life of his debtor to the extent of the debt, as the prospect of his obtaining payment is considered to be diminished by the debtor's death, and the circumstance that the creditor has also a real or other security for the same debt does not affect the rule (*b*) It makes no difference that the debtor is an infant, as the plea of infancy cannot be set up by third persons (*c*), but the debtor must not be an alien enemy (*d*)

No insurance must be made by way of gaming or wagering, and a policy effected to secure a debt won at play is void (*e*)

Insurable
interest of
surety in
life of prin-
cipal
Extent of

A surety has an insurable interest in the life of the principal debtor (*f*)

By sect. 3 of the Act of Geo III, the amount recoverable by

(*u*) *Reid v Royal Exchange Assurance Co*, Peake's Add Cas 70

(*x*) 45 & 46 Vict c 75, s 11 See post, p 338

(*y*) *Halford v Kymer*, 10 B & Cr 724, *Henson v Blackwell*, 4 Ha 434

(*z*) *Lucena v Crauford*, 2 B & P N R 324 But see *Cooke v Field*, 19 L J Q B 441, *Bunyon*, Ass 16

(*a*) *Tidswell v. Ankerstern*, Peake, N P Cas 151 See *Exp Houghton*, 17 Ves 253, *Exp Andrews*, 1 Madd 573

(*b*) *Anderson v Edre*, 2 Park, Ins 640, *Morland v Isaac*, 20 Beav 389, *Drysdale v Pigott*, 8 De G M & G 546, *Bruce v Garden*, L R 5 Ch A 32, *Salt v Marquess of Northampton*, (1892) A C 1

(*c*) *Dwyer v Edre*, 2 Park, Ins 914

(*d*) *Flindt v Waters*, 15 East, 260, *Harman v Kingston*, 3 Camp 153

(*e*) *Dwyer v Edre*, 2 Park, Ins 914

(*f*) *Lea v Hinton*, 5 De G M & G 823

he insured is made commensurate with his interest in his life and accordingly, where a person having an insurable interest in the life of another, insured the life to the full extent of the insurable interest, and payment of that policy had been made, it was held that he could not enforce payment of another policy effected by him on the same life (*g*).

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INSURANCE
INTEREST

It was formerly thought that the claim of a creditor was limited not only by the extent of his interest existing at the time of his effecting the policy, but also by the extent of his interest at the time of making the claim to the policy moneys (*h*). But this construction of sect 3 is overruled (*i*), and it is now settled that a policy of life assurance is not a contract of indemnity, but a contract for payment at a future time of a fixed sum, calculated with reference to the premiums payable, in order to purchase the postponed sum (*k*).

Continuing
interest not
necessary

iii.—Whether the Policy belongs to the Mortgagee or to the Mortgagor's Estate.—Where a creditor effects in his own name an assurance on the life of his debtor, the question may arise (unless precluded by the terms of the contract) whether the policy belongs to the creditor absolutely, or is redeemable by the representatives of the debtor

Whether, after
discharge of
mortgage, the
policy belongs
to the creditor
or the debtor

In the absence of contract, express or implied, to the contrary, a policy effected on the life of another belongs to the person who effects it (*l*).

General rules
where creditor
insures life of
debtor

And this rule has been held to apply where the grantee of an annuity so insured the life of the grantor (*m*).

Where the grantee of an annuity, at his own expense, assured the life of the grantor, and undertook, when the annuity was redeemed, to assign the policy to the grantor, it was held that, upon the death of the grantor without redeeming the annuity, the policy belonged to the grantee (*n*).

Where a loan was agreed to, one term of which was, that the debtor's life was to be insured in his own name, but the loan

(*g*) *Hobden v West*, 3 B & S 579.

(*h*) *Goodsall v Bolden*, 9 East, 71.

(*i*) *Law v London Indisputable Life Policy Co*, 1 K & J 223, at p 228.

(*k*) *Dalby v India and London Life Assurance Co*, 18 Jur 1024, *Robson v McCright*, 25 Beav 272, *Burnand v Rofoceanachi*, 7 App Cas 333, at p 340.

(*l*) *Humphrey v Arabun*, Ll & G temp Plunket, 318, *Brown v Free-*

man, 4 De G & S 414. *Eip Lancaster*, 4 De G & S 521. *Gottlieb v Cranch*, 4 De G M & G 410, *Fieme v Biade*, 2 De G & J 582.

(*m*) *Law v Warren*, Dru 31, *Knor v Turner*, L R 5 Ch A 515, *Pierston v Nich*, 12 Ch D 760. See *Morland v Isaac*, 20 Beav 380.

(*n*) *Bashford v Cunn*, 33 Beav 109.

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went off, a policy, having by mistake been effected in the name of the intended creditor, was held to belong to the debtor (o).

Where a person, with whom a policy of assurance is deposited by way of security, is appointed executor of the mortgagor, and he is obliged to give a receipt *as executor*, that will not render the whole sum, but only the surplus after retaining the amount of the mortgage debt, assets in his hands (p)

Application
of the rule
between
mortgagee
and repre-
sentatives of
mortgagor

It would seem to be the result of the cases that if an insurance company pays to a creditor the full amount of the moneys assured by a policy effected on the life of the debtor, and such moneys exceed the amount of the original insurable interest, or the amount owing in respect of the debt at the time of the death, the question whether the representatives of the debtor will be entitled to the balance will depend upon whether, by the express or implied terms of the contract, the policy was effected for the creditor's protection only, and for his benefit, or as a security for the debt

Insurance of
debtor's life
where no
agreement
to insure

So, where a creditor, to the knowledge of, but not in pursuance of any agreement with his debtor, insured the debtor's life to an amount calculated with reference not only to the amount of the debt, but also to the premiums to become payable to keep up the policy, so as, in effect, to recoup the creditor the premiums from time to time paid by him, it was held that, no contract to insure being proved, the creditor was entitled to the full benefit of the policy as against the debtor's estate; it was further said that, even if, as alleged by the debtor's representatives, the transaction was tainted by fraud in respect of the policy, so as to give the creditor no insurable interest therein, though the office would not have been liable to pay, and might possibly be entitled to recover the money paid to the creditor, the estate of the debtor had no right thereto (q).

Similarly, where a debtor at the request of his creditor, but not in pursuance of any agreement forming part of the mortgage contract, insured his life for an amount not exceeding the debt, and nominated the creditor as the person to receive the amount; the debt was reduced during the debtor's life, and, on his death, the creditor received the full amount: a claim by the debtor's administrator to recover the balance from the creditor was dismissed with costs (r).

(o) *Martin v. West of England, & Co.*, 4 Jur N S 158

(p) *Glaholm v. Rowntree*, 6 A. & E 710.

(q) *Frema v. Braze*, 2 De G. & J 582.

(r) *Brown v. Freeman*, 4 De G. & S 444.

Again, where a creditor effected in his own name a policy on the life of a debtor, and the premiums were charged to the debtor's account in the books of the creditor, but the fact was not communicated to the debtor, it was held that, there being no evidence of a contract for effecting the policy or payment of premiums, the creditor was entitled to retain the moneys received by him under the policy, and was not liable to account for them or the premiums to the debtor's representatives (s)

But if it appears by the terms of the contract, or upon a general view of all the circumstances of the transaction, that the policy was effected for the purpose of securing an advance or debt, the policy will be redeemable by the debtor or his representatives upon payment to the creditor of what appears to be due to him for principal, interest, premiums paid by him, and costs, notwithstanding any provision to the contrary in the instrument creating the security

If the insurance forms part of the mortgage contract, the policy belongs to the mortgagor's estate.

Usually, in the case of a secured debt, the intention is that the premiums shall be paid by the debtor, and that the policy shall eventually belong to him, and the security is framed accordingly (t)

The heir of entail of certain real estates in Scotland executed a bond and disposition in the Scotch form, whereby, in consideration of an advance of 10,000*l.* made to him by the trustees of an insurance society, he bound himself to pay that sum on a specified date with interest, and also to pay premiums payable on a policy of assurance which had been effected by the trustees in the society on his life against that of his father for 34,500*l.*; he thereby also assigned his reversionary interest in the real estates as security for the loan, reserving power of redemption. By a memorandum of even date with the bond, it was (among other things) agreed that the interest and premiums should be allowed to accumulate at compound interest for five years certain, and that, in the event of the debtor paying the whole amount due before his father's death, the trustees should assign the policy to the debtor, but that, in the event of the debtor not having paid the whole amount due before his father's death, the policy should belong absolutely to the trustees, without prejudice to the rights of the trustees under the bond, but that, if the debtor should predecease his father without having paid all

Right to policy depends on terms of contract

(s) *Bruce v Garden*, L R 5 Ch (t) *Dav Conv*, vol. II. pt. II p 130
A 32

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moneys due, the trustees should impute to the debt all moneys they might receive under the policy. The debtor died in his father's lifetime without having paid anything. It was held by Lord Selborne, Lord Bramwell, and Lord Morris (diss Lord Hannen), that upon the construction of the documents the transaction amounted to a mortgage of the policy, and accordingly that, on the principle "once a mortgage always a mortgage" (*u*), the clause purporting to render the policy irredeemable could not be supported (*x*).

In the case referred to (*y*), Lord Selborne thus stated the law on this question:—"I am not prepared to hold that if it were made out that the policy was effected for the creditor's benefit, subject only to an option for the debtor to acquire a right to it by making a payment, which he never made, the obligation of paying the premium, which the debtor certainly undertook, would have made it the property of the debtor, contrary to the contract. I see no principle on which I ought so to hold, since the repeal of the usury laws, and in the absence of any obligation or proof of fraud, oppression, or other unfair dealing. . . . But the authorities (*z*) certainly establish that the *primâ facie* effect of an agreement between debtor and creditor, in a transaction such as the present, that the creditor shall effect a policy, and that the debtor shall pay the premiums, is to vest the equitable property in the policy, subject to the creditor's security, in the debtor, the principle being that what the debtor pays, or agrees to pay for, is (*primâ facie*, at all events,) his, subject to the security for the purpose of which it was brought into existence."

General result
of decided
cases

If, then, an insurance is effected by a creditor on the life of his debtor, under a contract whereby it is agreed that the debtor shall pay the premiums (*a*), or be charged with them in account (*b*), or if an inference otherwise arises that the insurance was intended as a security (*c*), the policy or the balance of the

(*u*) See as to this rule, *ante*, p 12
(*x*) *Salt v Marquess of Northampton*,
(1892) A C 1

(*y*) *Ibid* at pp 15, 16
(*z*) *Holland v Smith*, 6 Esp 11,
Drysdale v Piggott, 8 De G M & G
546, *Morland v Isaac*, 20 Beav 389,
Bruce v Garden, L R 5 Ch A 532
(*a*) *Holland v Smith*, 6 Esp 11, *Re*
Storie's Trusts, 1 Giff. 94.

(*b*) *Morland v Isaac*, 20 Beav 389,
Holland v Smith, *sup*, *Drysdale v*
Piggott, 8 De G M & G 546

(*c*) *Williams v. Athyns*, 2 J & L
603, and *Hawkins v Woodgate*, 7
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insurance moneys will be the property of the debtor after payment of the debt, and the result is the same if the insurance be on the life of a surety, instead of on the life of the principal (*d*)

CHAPTER XXII

But the Court requires distinct evidence that the creditor has agreed to effect a policy, and that the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor (*e*).

Evidence of contract by debtor to pay premiums required

iv.—Modes of effecting Mortgages of Policies—Where policies are effected for the purpose of security for a loan or a subsisting debt, they may be effected either by the debtor in his own name, and assigned by him by way of mortgage, or by the creditor in his name, in which case no assignment will be necessary. The latter course has the further advantage of removing certain risks, such as avoidance of the policy by suicide of the assured. But though, if this course is adopted, an assignment is not required, a deed will be necessary for the purpose of containing covenants by the debtor for payment of the money advanced and interest thereon, and to keep up the policy. It is usual to provide expressly that, on discharge of the debt, the policy shall be redeemable, but, as has been seen, if it appears by the transaction that the policy was effected by the creditor by way of security, and the debtor is made liable to pay the premiums, the policy will be redeemable without any proviso to that effect, or notwithstanding a proviso to the contrary (*f*).

Different modes of effecting policies for purpose of security

A mortgage of a life policy is generally framed according to the ordinary form of a mortgage by assignment of the policy, but will contain, after a declaration of trust of the policy moneys, or, if this is omitted in reliance on the statute, after the proviso for redemption, covenants to keep up the policy and subsidiary clauses.

Form of mortgage of policies

If a policy of assurance is assigned, "together with the sum assured," it has been held that future bonuses will pass by the assignment (*g*). But it is well to avoid all question by expressly including bonuses in the assignment (*h*).

Bonuses

Formerly the assignment included a power of attorney to receive the insurance money, which was held to be valid, though it could not come into operation until the death of the prin-

Power of attorney to receive policy moneys

(*d*) *Bell v Ahearn*, 12 Ir. Eq. R. 376, 578.

(*e*) *Bruce v Garden*, L. R. 5 Ch. A. 532.

(*f*) See *supra*.

(*g*) *Courtney v Ferrers*, 1 Sim. 137, *Parkes v Bott*, 9 Sim. 388.

(*h*) *Gully v Burley*, 22 Beav. 619, *Roberts v Edwards*, 33 Beav. 259.

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If, then, an insurance is effected by a creditor on the life of his debtor, under a contract whereby it is agreed that the debtor shall pay the premiums (*a*), or be charged with them in account (*b*), or if an inference otherwise arises that the insurance was intended as a security (*c*), the policy or the balance of the

(*u*) See as to this rule, *ante*, p. 12.

(*x*) *Salt v. Marquess of Northampton*, (1892) A. C. 1.

(*y*) *Ibid.* at pp. 15, 16.

(*z*) *Holland v. Smith*, 6 Esp. 11, *Drysdale v. Piggott*, 8 De G. M. & G. 546, *Morland v. Isaac*, 20 Beav. 389, *Bruce v. Gardin*, L. R. 5 Ch. A. 532.

(*a*) *Holland v. Smith*, 6 Esp. 11, *Re Storie's Trusts*, 1 Giff. 94.

(*b*) *Morland v. Isaac*, 20 Beav. 389, *Holland v. Smith*, *sup.*, *Drysdale v. Piggott*, 8 De G. M. & G. 546.

(*c*) *Williams v. Atkyns*, 2 J. & L. 603, and *Hawkins v. Woodgate*, 7 Beav. 565 (both cases of annuities), *Exp. Andrews*, 1 Madd. 573, *Lea v. Hinton*, 5 De G. M. & G. 823, *Coutenay v. Wright*, 2 Giff. 337.

insurance moneys will be the property of the debtor after payment of the debt, and the result is the same if the insurance be on the life of a surety, instead of on the life of the principal (*d*)

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But the Court requires distinct evidence that the creditor has agreed to effect a policy, and that the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor (*e*)

Evidence of contract by debtor to pay premiums required

iv.—Modes of effecting Mortgages of Policies.—Where policies are effected for the purpose of security for a loan or a subsisting debt, they may be effected either by the debtor in his own name, and assigned by him by way of mortgage, or by the creditor in his name, in which case no assignment will be necessary. The latter course has the further advantage of removing certain risks, such as avoidance of the policy by suicide of the assured. But though, if this course is adopted, an assignment is not required, a deed will be necessary for the purpose of containing covenants by the debtor for payment of the money advanced and interest thereon, and to keep up the policy. It is usual to provide expressly that, on discharge of the debt, the policy shall be redeemable, but, as has been seen, if it appears by the transaction that the policy was effected by the creditor by way of security, and the debtor is made liable to pay the premiums, the policy will be redeemable without any proviso to that effect, or notwithstanding a proviso to the contrary (*f*)

Different modes of effecting policies for purpose of security

A mortgage of a life policy is generally framed according to the ordinary form of a mortgage by assignment of the policy, but will contain, after a declaration of trust of the policy moneys, or, if this is omitted in reliance on the statute, after the proviso for redemption, covenants to keep up the policy and subsidiary clauses

Form of mortgage of policies

If a policy of assurance is assigned, "together with the sum assured," it has been held that future bonuses will pass by the assignment (*g*). But it is well to avoid all question by expressly including bonuses in the assignment (*h*).

Bonuses

Formerly the assignment included a power of attorney to receive the insurance money, which was held to be valid, though it could not come into operation until the death of the prin-

Power of attorney to receive policy moneys

(*d*) *Bell v. Aheane*, 12 Ir Eq R. 376, 578

(*e*) *Bruce v. Garden*, L R 5 Ch A 532

(*f*) See *supra*

(*g*) *Courtney v. Ferrers*, 1 Sim 137, *Parkes v. Bell*, 9 Sim. 388.

(*h*) *Gilly v. Bulley*, 22 Beav 619, *Roberts v. Edwards*, 33 Beav. 259.

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cipal (i). But the insertion of such a power is now rendered unnecessary by the Policies of Assurance Act, 1867 (k), which enables the assignee of a policy to sue for and recover the moneys in his own name, without the concurrence or receipt of the representatives of the mortgagor.

Proviso for redemption.

A mortgage of a policy should be framed with a view to the contingency of foreclosure, for which purpose there should be the ordinary proviso for redemption (l).

Power to give receipts

An express power to give receipts was once material (m), but is now of no moment, having regard to the extensive powers of giving receipts now conferred on mortgagees and trustees (n).

Declaration of trust of policy moneys

According to the former practice in framing mortgages of policies, a declaration of trust of moneys received in respect of the policy was inserted, but this is now rendered unnecessary by the Conveyancing and Law of Property Act, 1881 (o), s 22, which, after making the receipt of a mortgagee a sufficient discharge for moneys arising under his mortgage, provides that the money received under a mortgage (after payment of costs of recovering and receiving the same) is to be applicable in the same manner as the proceeds of sale under the statutory power given to mortgagees by sect 19 of the same Act.

Covenants for keeping up insurance

The mortgage must contain a covenant to keep up, and, if required, to restore the policy. The covenant to keep up the insurance should be in terms negative, i.e., that the mortgagor will not do any act by which the policy may be avoided, and not merely affirmative that he will do all acts requisite for keeping up the policy, otherwise the avoidance of the policy by the suicide of the assured will not be a breach of the covenant (p). Where a policy was assigned with a covenant to do no act by which the policy might be avoided, and the covenantor avoided it by going beyond the limits of Europe without the required licence, the Court directed that the measure of damages should be the market value of the policy at the time

(i) *Pearson v Amicable Assurance Office*, 27 Beav 229.

(k) 30 & 31 Vict c 144

(l) See *Stade v Rigg*, 3 Ha 35, *Wayne v Hanham*, 9 Ha 62, and per Turner, L J, in *Drysdale v Piggott*, 8 De G M & G 552

(m) *Brasier v. Hudson*, 9 Sim. 1, *Desborough v. Harris*, 5 De G M & G 439, *Glyn v Locke*, 3 Dr & War.

(n) Lord St Leonards' Act (22 & 23 Vict c 35), s 23, and Lord Cranworth's Act (23 & 24 Vict c 145), ss 29, 34, and now the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict c 41), s 22

(o) 44 & 45 Vict c 41

(p) *Doimay v Borradaile*, 5 C. B. 380, *S C*, 10 Beav 335 See *Dav. Conv* vol II, pt 2, 134

of the breach of covenant, considering as a fact that the defendant had covenanted to pay, and would pay, the premiums (g) CHAPTER XVII

Where the mortgagor merely covenants to keep up the policy, or in default that the mortgagee may pay the premiums and add the amount to his debt, the damages for breach of such covenant are nominal; the remedy is to add the premiums to the debt; but where the covenant is to repay the premiums, the amount paid is the measure of the damages (r)

Where a mortgagor insured his life as an additional security and covenanted to pay the premiums, and that in default of his so doing the mortgagee might pay them and recover the amount, the mortgagor was not protected, by his discharge under the Insolvent Debtors Act, from an action of covenant by the mortgagee for premiums becoming due after his discharge, and paid by the mortgagee (s); but this is altered by the present Bankruptcy Act (t)

The statutory power of sale is usually relied upon in mortgages of policies, as in the case of other mortgages at the present time; but it is advisable to insert in the deed an express proviso that the power may be exercised by way of surrender to the office granting the policy Power of sale

Policies of assurance are often effected for securing loans made by insurance societies on life interests, and on contingent reversionary interests. The loan is usually expressed to be made by persons who are in fact the trustees of the society, but are not stated to be such, and the covenants by the mortgagor to pay principal and interest and to keep up the policy are made with the trustees. Where a policy is effected by way of security in the office of the society in which the loan is made, the usual and proper course is for the mortgagor to effect the insurance in his own name, and to assign the policy to the mortgagees by way of mortgage, for if the insurance is effected in the name of the trustees they may not be able to charge the premiums if the mortgagor should fail to pay them. Where mortgagee society is its own insurer

Where, in consideration of a loan by an insurance society, the borrower covenanted with the trustees of the society that if they should pay any additional rate of insurance by reason of

(g) *Hawkins v. Coulthurst*, 12 W R 825
See 2 Dav Conv vol II, pt 2, p 134
(r) *Brown v Price*, 4 Jur. N S

882—889
(s) *Bennett v Burton*, 12 A. & E 657
(t) 46 & 47 Vict c 52, s 30 (2)

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his going beyond seas he would pay to the trustees all such sums as should be advanced by them or their *cestui que trust* for such additional premiums; no policy was, in fact, effected, except that the company, immediately after the loan was made, became their own insurers by effecting a policy in a branch of their own office, and on the borrower going abroad additional premiums were charged against him in respect of the policy it was held that the policy effected, being merely an agreement that the society should pay to itself certain sums, was an empty formality on which nobody could sue, and that no additional premiums could be charged against the borrower, none having in fact been paid. It was, however, pointed out by Stuart, V.-C., in the case referred to, that the covenant might have been framed so as to entitle the trustees to retain and be paid a certain annual sum by way of indemnity in case the borrower should go abroad (u).

But where, upon a mortgage of a life interest, the trustees of an insurance society, as further security for the loan, effected a policy on the mortgagor's life in the office of the society, and by the mortgage deed, which recited that the policy had been so effected, the mortgagor covenanted that if he should fail to pay the premiums it should be lawful for the trustees to pay them; the mortgagor, after paying the premiums for several years, ceased to do so, and the society debited his account in their books with the annual amounts, and added them to the mortgage debt, it was held by Stuart, V.-C., that, the policy having been recited in the mortgage deed, and proved to have been in existence at the time of the loan, he could not deal with the case upon the footing that no policy of assurance had in fact been effected, and accordingly he held that the society was entitled to be allowed the sums with which they had debited the mortgagor (v).

Forfeiture of
policy

v.—Other Matters relating to Mortgages of Policies—Where money advanced by an insurance company is secured by a policy of assurance effected at that office by the borrower, and by a bond with sureties for securing the principal money and interest, and premiums, if the policy becomes forfeited by non-payment

(u) *Grey v Ellison*, 1 Giff 438. See also *Hutchinson v. Wilson*, 4 Bro C C 488.

(v) *Earl Fitzwilliam v Price*, 4 Jur N S 889. See *Brown v Price*, 4 Jur. N. S 882.

of the premiums, a Court of equity will not, it seems, upon the death of the assured, deprive the company of the benefit of the forfeiture, though at the time of the death of the assured actions had been brought by the company against the sureties for the premiums; and the company will be at liberty to prosecute an action for principal and interest against the same parties (y) CHAPTER XVII

Of course, a company may, by the acts of its directors or agents, waive a forfeiture incurred by failure to observe the conditions of the policy (z). Waiver of forfeiture

Where a policy holder borrows money on his policy from the insurance society, which is wound up, and a value is set upon the policy, the official liquidator of the society cannot set off the debt against such value; nor, if the policy holder becomes bankrupt, can his trustee set off the value against the debt (a) Set-off on winding up of insurance society.

A covenant by the mortgagor to pay future premiums is now proveable in bankruptcy, the provisions of the Bankruptcy Act, 1883 (b), as to proof of future liabilities being of the most general character, so as to cover every species of contingency (c) Proof in bankruptcy

Where a mortgagor of a policy of assurance became bankrupt, but continued to pay the premiums, it was held that his estate had a lien on the policy moneys with interest at 4 per cent. (d); and the administrator of a mortgagor not bankrupt was held entitled to a similar lien (e), but a stranger paying the premiums has no lien, except under special circumstances (f) Lien for premiums paid by bankrupt.

Where, on the bankruptcy of the assured, a policy held by a creditor becomes forfeited by non-payment of the premium, a new policy subsequently taken out by the creditor for his own protection does not belong to the trustee (g) Substituted policy

The question as to the necessity of giving notice to the office in which a policy is effected of any assignment thereof, so as to entitle the assignee to receive the policy moneys and to obtain priority over other assignees, will be considered later (h). Notice of assignments of policies

(y) *Edge v Duke*, 18 L J Ch 183

(z) *Wing v Harbo*, 5 De G M & G 265

(a) *Exp Price, Re Lankes*, L R 10 Ch A 648

(b) 46 & 47 Vict c 52, s 37

(c) See *Exp Neal*, 14 Ch D 579, at p 583, C A. See also *Exp Waters, Re Hoyle*, L R 8 Ch. A. 562, at p 568.

(d) *Shearman v British Empire, &c Co*, L R. 14 Eq 4. But *qu.* see *Saunders v Dunman*, 7 Ch D 825, 829

(e) *Norris v Caledonian Insurance Co.*, L R 8 Eq 127, *sed qu.*

(f) *Re Leslie, Leslie v. French*, 23 Ch D 552

(g) *Re Gaskell*, W N (1881) 130

(h) See *post*, Chap LVI. p 1267.

CHAPTER XVIII.

OF MORTGAGES OF PENSIONS, SALARIES, ETC.

Emoluments
of judicial
offices

THE sale of public offices is *malum in se*, independently of the statute law (a) But by a statute of Edw. VI all assurances of any office concerning the administration or execution of justice, or any service of trust, or the receipt, control, or payment of the king's revenues or customs, or the custody of fortresses, or the clerkship in any Court of record where justice is to be administered, were declared to be void, as against the person making the assurance, with an exception in favour of offices of inheritance, and of the keeping of parks or forests (b)

Pay of officers
of the Crown.

This Act (preserving the exceptions) was afterwards extended (c) to Scotland and Ireland, and to all offices in the gift of the Crown, civil, naval, and military commissions and employments under the control of the different officers of state

Naval and
military
pensions.

Another statute (d) declares to be void all assignments of and charges on, and agreements to assign or charge any deferred pay or military reward, pension, allowance, or relief payable to any officer or soldier of her Majesty's forces, or any widow, child, or other relative of any such officer or soldier, or any person in respect of any military service And it is provided by statute, that all assignments, sales or contracts relating to naval pensions, half-pay or allowances, by officers, seamen, or marines, or their widows, or other persons entitled to an allowance from the compassionate fund or to marine half-pay, are void (e).

Seamen's
wages.

Bills of sale, contracts, and assignments of any pay, wages, or allowances of money of any kind, due, or to grow due, to any seaman in the service of the Crown, are also void (f).

(a) *Stackpole v Earle*, 2 Wils. K B 133

(b) 5 & 6 Edw VI c 16

(c) 49 Geo III c. 126

(d) 44 & 45 Vict c 58, s 141, by which Act the similar provisions of the 47

Geo III sess. 2, c 25, s. 2, are repealed

(e) 28 & 29 Vict c 73, s 4

(f) *Ibid* s. 5 See as to seamen in the Merchant Service, 57 & 58 Vict c 60, s 163

The following are not assignable :—

Pensions granted for supporting the grantee in the performance of *future* services, such as the pension granted by 5 Anne, c 4, for the more honourable support of the dignities of the Duke of Marlborough (*g*) and his posterity, payable out of the revenue of the Post Office, the salaries of the judges given for the support of the dignity of their office (*h*); the salary of a clerk of the peace (*i*); and, in fact, the emoluments of any public office (*h*); annuities *pro consilio impendendo* (*l*); full pay and half-pay of an officer (*m*); a retiring pension of a military officer of the East India Company, which has been held not to pass to the assignees in bankruptcy, on the ground of being a voluntary payment (*n*).

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Other
pensions not
assignable

Pensions for military service, being rendered inalienable by the recent statutes, cannot be taken in execution under 1 & 2 Vict c. 110, ss 14, 15, nor can a receiver of any such a pension be appointed, even though the grantee is not liable to be called into service again (*o*). The difference in this respect between half-pay and pensions, drawn in several decisions before the Acts (*p*), has ceased to be regarded. This immunity does not, however, extend to money paid in respect of commutation of retired pay (*q*). There is a power vested in a trustee in bankruptcy to reach the pay or salary of a military, naval, or civil officer, or a portion thereof, with the consent of the chief officer of the department (*r*); and half-pay, pensions, or compensation of officers may be ordered by the Court to be paid to the trustee in bankruptcy (*s*). The commission of an officer cannot be mortgaged or pledged (*t*). A voluntary allowance is not a salary or pension within the Act (*u*)

(*g*) *Davis v Duke of Marlborough*, 1 Swanst 74.

(*h*) *Ib* arguendo

(*i*) *Palmer v Bate*, 2 Br. & B 673

(*l*) *Hill v Paul*, 8 Cl & F 295

(*o*) 1 Dy 2, a n

(*m*) *B. Avock v Reade*, 1 H Bl 627, *Flaxby v Odium*, 3 T R 681, *Arbuck v Cowtan*, 3 B & P 328; *Liddendale v Duke of Montrose*, 4 T R 248, *Stone v Ludderdale*, 2 Anst 533, *McCarthy v Gould*, 1 Ba. & Be 387, *Price v Lovett*, 20 L J Ch 270 (including a pension for wounds), *Lloyd v Cheetham*, 3 Giff 171, *Wilcock v Terrell*, 3 Ex D 326

(*n*) *Gibson v East India Co*, 7 So 73 See *Exp Hauker*, L R 7 Ch A

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(*o*) *Lucas v Harris*, 18 Q B D 127, C A See *Burch v Burch*, 8 P D 163, a case under the Indian Pensions Act, 1871

(*p*) *Wells v Foster*, 8 M & W 149, *Spencer v Payne*, 1 De G M & G 383, *Carew v Cooper*, 4 Giff 619, 12 W R 198, *Heald v Hay*, 3 Giff 467; *Dent v Dent*, L R 1 P & D 366, *Wilcock v Terrell*, 3 Ex D 323.

(*q*) *Crowe v Price*, 22 Q B D 429, C A

(*r*) B A 1883, s 53, sub-s 1

(*s*) *Ibid* sub-s 2

(*t*) *Calliger v Fallon*, 1 T & R 459

(*u*) *Exp Wicks*, 17 Ch D 70, C A, *Exp Webber*, 18 Q B D 111 See

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Pensions
assignable

The following are assignable:—

Compensation to a custom-house officer for the loss of office (though revocable at the pleasure of the government) (*x*); pension to commissioner of bankrupts (*y*); moneys payable to the representatives of an Indian judge, if he should die in, and after six months' possession of, office (*z*), prize money and the captors' inchoate or possible interest in it before grant by the Crown (*a*); a pension granted to a County Court judge for past services (*b*), or to a judge of a Crown colony (*c*); and, generally, civil service pensions (*d*)

The profits of certain hereditary or freehold offices (most of which are now abolished) are assignable (*e*). So also the salaries of mere secretaries or clerks receivable during the pleasure of their superiors, are not "offices" within the statute of Edw VI (*f*)

Ecclesiastical
profits and
pensions

Since the 57 Geo III. c 99, church livings, a canonry, or other ecclesiastical office, cannot be assigned (*g*). Nor can pensions to incumbents on resignation of their benefices (*h*) be transferred either at law or in equity, or be subject to a set-off (*i*). But annuities by way of compensation to retiring incumbents under the Union of Benefices Act, 1860 (*h*), may be validly assigned (*l*)

A receiver has been appointed of the profits of a college fellowship, on the ground that no question of public policy could interfere with the validity of an assignment thereof (*m*).

A mortgage of the salary of a workhouse chaplain, which was paid out of local poor rates, was held to be valid (*n*)

Alimony

Alimony has been held not to be assignable (*o*); and the same rule applies to permanent maintenance after divorce (*p*).

Exp Benuell, 14 Q B D 301, C A,

Re Shine, (1892) 1 Q B 522, C A

(*x*) *Tunstall v Boothby*, 10 Sim 542,

Exp Corser, 11 Jur 212.

(*y*) *Spooner v Payne*, 1 De G M & G 383

(*z*) *Asbithnot v Norton*, 5 Moo P C 219

(*a*) *Alexander v Duke of Wellington*,

2 R & M 35

(*b*) *Willcock v Terrell*, 3 Ex D 323

(*c*) *Exp Huggins*, 21 Ch D 85, C A

(*d*) *Sansom v. Sansom*, 4 P D 69,

Exp Huggins, *supra*

(*e*) *Drummond v. Duke of St. Albans*,

5 Ves 433

(*f*) *Aston v Gwinnell*, 3 Y & J 136

(*g*) *Post*, p 440

(*h*) 34 & 35 Vict c 44, s 10

(*i*) *Gathercole v Smith*, 17 Ch D 1, C A

(*l*) 23 & 24 Vict c 142

(*l*) *McBean v Deane*, 30 Ch D 520

(*m*) *Feistel v King's Coll Cambridge*,

10 Beav 491 But see *Berkeley v*

King's Coll Cambridge, 10 Beav 602

(*n*) *Re Mirams*, (1891) 1 Q B 594

(*o*) *Re Robinson*, W N (1884)

169, C A

(*p*) *Watkins v Watkins*, (1896) P.

222, C A.

The allowance made in lunacy to a committee, though made indirectly for his benefit and without liability to account, is nevertheless an allowance made to a person in a fiduciary position for a particular purpose, and may be revoked at any time so far as not actually paid; no valid mortgage can accordingly be made of the allowance or of any arrears of it (*q*).

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Allowance to committee of lunatic

A mortgage by a member of the Customs Annuity and Benevolent Fund of two-thirds of his portion payable at his death, was held to be valid where the mortgagees had been admitted as nominees by the directors (*r*); but the member has only a power of appointment over the sum insured, and no right of property in it; if no nominee is admitted, the sum must go according to the rules (*s*).

Customs Annuity Fund

(*q*) *Re Weld*, 20 Ch D 451, C A

(*r*) *Re Phillips' Insurances*, 23 Ch D

(*s*) *Re Maclean's Trusts*, L R 19 235, C A

CHAPTER XIX.

OF MORTGAGES OF DEBTS AND LEGACIES.

SECTION 1.

OF A MORTGAGE OF DEBTS

Debts may be mortgaged. **i.—What Debts may be Mortgaged.**—All debts, secured and unsecured, may form the subject of mortgages. Unsecured debts can rarely afford a satisfactory security; but it not unfrequently happens that a mortgage is itself transferred by way of security by the mortgagee, thus giving rise to what is called a sub-mortgage (*a*).

Future debts. A debtor may assign future accruing payments to be made to him under an engagement with a third person (*b*). But a mortgage of the future gross receipts of a business is not good against the title of the trustee in bankruptcy by relation (*c*).

A bill of sale of all goods which should be brought upon the premises or should be in any other place in the debtor's possession, does not include the book debts (*d*).

A mortgage of all present and future personalty was held invalid as to the future property (*e*). This was founded on *Belding v Read* (*f*). But the authority of these cases is much shaken by the decision of the House of Lords in *Tailby v Official Receiver* (*g*), where their lordships, while declining to adjudicate upon the question, which was not before them, of a charge including all the property whatever of the person giving it, held that an assignment by way of security for a loan of all the book debts due and owing, or which might during the

(*a*) See as to sub-mortgages, *post*, Chap XLII p 830

(*b*) *Poolley v Goodwin*, 4 A. & E. 94. See *Exp Moss, Re Toward*, 14 Q. B. D. 310, C. A.

(*c*) *Exp. Nicholls*, 22 Ch. D. 782, C. A.

(*d*) *Browne v Fyler*, 46 L. T. 636, C. A.

(*e*) *Re D'Epuneuil, Tadmore v D'Epuneuil*, 20 Ch. D. 758

(*f*) 11 Jur. N. S. 547

(*g*) 13 App. Cas. 523

continuance of the security become due and owing to the mortgagor, though not limited by reference to any particular business, was valid.

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ii—Precautions to be observed by Mortgagee of Debts.—In taking an assignment of a debt by way of mortgage, the following precautions should be observed :—

1st. The intending mortgagee should be careful to ascertain, by previous communication with the person by whom the debt intended to be mortgaged is owing, that the sum alleged to be due is actually due; a written admission of this fact should, if possible, be obtained; otherwise, the mortgagee exposes himself to the danger of a question being raised between him and the debtor as to the amount actually due, as a mortgagee of a debt will take subject to all accounts between the creditor and the debtor in like manner as the transferee of a mortgage (*h*)

Inquiry as to amount due in respect of the debt

2ndly The mortgage deed should contain a clause providing that it shall not be obligatory on the mortgagee to sue for the debt unless and until he shall think proper

Protection of assignee of debt against obligation to sue

On every assignment of a debt by way of security, it is essential that the assignee should be specially protected against the obligation which—whether by analogy to a mortgagee in possession who is bound to account for what he might have received but for his own default (*i*), or to a creditor who, by giving time to the principal debtor, discharges the surety (*k*)—would otherwise attach to him to get in the debt in due course, under penalty of being charged with the loss in case any arise through his default (*l*) A similar liability would no doubt attach to the mortgagee of any chose in action which should be lost or impaired in value by his omitting to get it in at the proper time, and should always be guarded against by a clause protecting the mortgagee against involuntary losses (*m*); but it is obvious that there is both much more uncertainty as to the time for realising, and much more risk of loss through the omission to realise at the proper time, where a mere debt is in question, than where a title accrues to a specific fund. Hence, a mortgagee should be as careful to protect himself in this respect as

(h) *Matthews v Walwyn*, 4 Ves 118, *Chambers v. Goldwin*, 9 Ves 254, at p 264

(i) 2 Dav Conv vol. ii. pt 2, p. 139.

(k) See *Gurney v. Seppings*, 2 Ph. 40, 42

(l) Dav Conv vol. ii. pt 2, p 140, *Exp. Mure*, 2 Cox, 63, *Williams v. Price*, 1 S & St. 581.

(m) See Byth & Jarm. Conv. (4th ed.), vol. iii. p. 818.

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any other fiduciary owner who acquires the right, and with it assumes the duty, of getting in a debt (n)

Lord Thurlow, in *Ex parte Mure* (o), stated the doctrine so strongly as to render it extremely dangerous for a person to take even a mortgage debt as security without an indemnity clause of the nature above suggested. His lordship said, in the course of his judgment —“I think it very difficult to conceive a case where there has been anything like forbearance to the debtor without the concurrence of the assignor without involving the assignee in the consequences of such conduct” Sir John Leach, V-C, in the later case of *Williams v. Price* (p), intimated a doubt whether the principle laid down in *Ex parte Mure* could be adopted without qualification, and pointed out that the giving of time might be a provident act and afford the best chance of recovering the debt; but his honour held, that if a debt becomes irrecoverable by the wilful default or neglect of the assignee, he must bear the loss.

An indemnity clause should never be omitted when a debt is assigned by way of sub-mortgage or other security to trustees.

Power for mortgagee to compound debt

Sometimes it may be convenient in the assignment of a debt by way of mortgage to give the mortgagee a power to compound or accept any composition or security for the payment. Such a power, however, should be given with caution, and perhaps can scarcely ever be reasonably required, unless it is likely that the mortgagor's absence beyond seas, or other special circumstances, will be likely to prevent him from concurring in such an arrangement.

Notice to debtor of assignment

3rdly. The mortgagee should, immediately upon completion of the mortgage, give to the debtor notice of the assignment.

Independently of the provisions of the Judicature Act, 1873, the observance of this precaution will protect the mortgagee from the risk of the debtor paying the debt wholly or in part to the mortgagor, which the debtor would of course be justified in doing if he had no notice of the assignment (q); and also from the risk of the mortgagor mortgaging or selling the debt to some other person, not having notice of the previous assign-

(n) 2 Dav. Conv (4th ed) vol II
pt 2, p 140

(o) 2 Cox, 63, at p 76

(p) 1 S & St 581.

(q) *Jones v. Gibbon*, 9 Ves 410
See *Norris v. Marshall*, 5 Madd 475,
Williams v. Sorrell, 4 Ves 389, *Re*
Lord Southampton's Estate, *Allen v.*
Lord Southampton, 16 Ch D. 178, 187.

ment, who, by first giving notice to the debtor, might gain priority over the original mortgagee (*v*)

If a bond is the subject of assignment, not only should the instrument itself be given up to the assignee, so as to prevent the original obligee from dealing with the bond debt, but notice of such assignment should be given to the debtor, to prevent his payment of the bond debt to the obligee, which, in default of such notice, would be valid and discharge the security (*s*)

The equitable assignee of a debt is not subject to the same rules as the holder of a bill of exchange or promissory note so as to make it obligatory upon him to give notice to the assignor of non-payment by the debtor, though he would be chargeable with any loss arising from his wilful default in not getting in the debt at the proper time (*t*)

iii.—Power of Attorney.—Before the Judicature Act, 1873 (*v*), the right of suing at law for a debt could not, as a general rule, have been transferred. The exceptions were negotiable securities, as bills of exchange and promissory notes (*x*), bail bonds (*y*), replevin bonds (*z*), railway mortgages and bonds (*a*), life policies (*b*), marine policies (*c*) (under which the assignee can sue in his own name, but the underwriter may set off any debt due to him by the assured (*d*)), bills of lading under the Bills of Lading Act if indorsed (*e*). Right to sue not formerly transferable.

It has till recently been the usual practice to effect mortgages of legal debts (*i e*, of debts conferring a right of action at law) by means of an assignment with a power of attorney enabling an assignee to use the name of the assignor, so as to avail himself, for his own benefit, of the assignor's right of action. The power, being a power given for valuable consideration, may, if inserted, be expressly made irrevocable (*f*). Power of attorney to sue.

By the Judicature Act, 1873 (*g*), it is enacted as follows:—

“Any absolute assignment, by writing under the hand of the Absolute assignment

(*v*) See further as to notice as affecting priorities of incumbrances on choses in action, *post*, pp 1265 *et seq*

(*s*) *Ryall v Houles*, 1 Ves Sen 367
See *Williams v Thorp*, 2 Sim 257,
Exp Colvill, Mont 110

(*t*) *Glyn v Hood*, 1 De G F & J 334

(*u*) 36 & 37 Vict c 66, s 25, sub-s (6).
(*x*) 3 & 4 Anne, c 9; 7 Anne, c 25,

s. 3

(*y*) 4 Ann c 16, s 20

(*z*) 11 Geo 2, c. 19, s 23

(*a*) 8 & 9 Vict. c 16, s 47

(*b*) 30 & 31 Vict c 144, see *ante*,
p. 294

(*c*) 31 & 32 Vict c. 86

(*d*) *Pellus v Neptune Marine Insurance Co.*, 4 C. P. D 139

(*e*) 18 & 19 Vict. c. 111

(*f*) See Conveyancing Act, 1882
(45 & 46 Vict c 39), s. 8

(*g*) 36 & 37 Vict c 66, s 25, sub-s (6)

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of debts, &c
confers right
to sue

assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor

"Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under, and in conformity with, the provisions of the Acts for the relief of trustees "

Whether a
mortgage of
a debt is an
"absolute
assignment "

It will be observed that the above enactment applies only to absolute assignments not purporting to be by way of charge only; and the question whether a mortgage of a debt is an absolute assignment within the meaning of the Act has given rise to some conflict of judicial opinion.

Sub-mort-
gage held
not to be an
"absolute
assignment."

In *National Provincial Bank v. Harle* (h), a mortgage debt and the securities for the same were assigned by way of sub-mortgage by a deed which contained a proviso for redemption in the usual form, but no power of attorney; the sub-mortgagee gave notice of the assignment to the original mortgagor Pollock, B., held that this was not "an absolute assignment," but an assignment purporting, on the face of it, to be by way of charge only within the meaning of the Act, and he accordingly upheld an objection by the original mortgagor that the sub-mortgagees had no right of action. His Lordship further intimated that a case might arise necessitating a decision as to the meaning of the words "purporting to be by way of charge only," whether they mean an assignment which expresses on the face of it to be, or one which, coupled with all the surrounding circumstances, shows that it is, "by way of charge only "

Assignment
of debts on
trust to
receive and
repay loan,

In *Burlinson v. Hall* (i), the precise question suggested by Pollock, B., arose. In that case, certain debts were assigned by deed without any proviso for redemption, but upon trust that

(h) 6 Q. B. D. 626.

(i) 12 Q. B. D. 347.

the assignee should receive the debts, and out of them pay himself the sum due to him from the assignor, and pay the surplus to the assignor. The deed contained a power of attorney enabling the assignee to sue in the name of the assignor, but the assignee brought the action in his own name only. It was urged on behalf of the debtor that this was in effect an assignment by way of mortgage or charge only, and that as, after payment of the debt due to the assignor, the surplus would belong to him, the assignment could not be regarded as absolute. It was held by Day and A. L. Smith, JJ. (by the latter with some hesitation), that this was an absolute assignment within the Act, so as to give the assignee a right to sue in his own name; not absolute, indeed, as a sale, but absolute as contradistinguished from conditional—an assignment giving a title there and then; and, moreover, that the deed did not purport to be a charge at all.

CHAPTER XIX.
—
&c., held to be
an "absolute
assignment."

So far, it is submitted that (but for the decision referred to below) there would not seem to be any direct or irreconcilable conflict of decision; the instruments in the two cases differed materially in form and in legal effect, though, for all material purposes, they were equally to be regarded in equity as mortgages, by being, on the face of them, subject to liability to account as between the assignor and assignee, and to redemption. In the former case, the assignment, at the time it was made, gave even at law only a title liable to be put an end to by reconveyance on payment at the stated time by the assignor. In the latter case, the assignment was in terms clearly absolute at law, though redeemable in equity by virtue of the nature of the trusts attached to the assignment; and it is perhaps not quite easy to see how such an assignment could be regarded as absolute and not by way of charge consistently with the rule laid down in a later part of the section that "where there is any variance between the rules of equity and the rules of law with reference to the same matter, the rules of equity shall prevail" (k).

Suggested
distinction
between
the above
decisions.

But a different view from that here suggested was taken in *Tancred v. Delagoa Bay Co.* (l) by Denman and Charles, JJ., who were of opinion that the two decisions above referred to were inconsistent and not reconcilable, and that the later case

Mortgage
of debts in
ordinary form
held to be an
"absolute
assignment."

k) Sect. 25 (2)

(l) 23 Q. B. D. 239.

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was right, and ought to be followed in preference to the former. In the case now under consideration, a mortgage of debts due to the mortgagor, made in the ordinary form, with proviso for redemption and reconveyance upon repayment to the mortgagee, was held to be an absolute assignment not purporting to be by way of charge only within the meaning of the Act. Denman, J., said, that the document in this case did not purport to be by way of charge only, either expressly or by necessary inference from its provisions, and that the proviso for redemption did not prevent it from being absolute or make it purport to be by way of charge only. He drew a distinction between the document in this case and a document given "by way of charge," which he defined as, not one which transfers the property with a condition for reconveyance, but one which only gives a right to payment out of a particular fund or particular property without transferring that fund or property. His lordship thus appears to have limited the statutory exception to hypothecations operating by way of equitable assignment.

Observations
on this
decision

Of course, an assignment by way of mortgage, with a proviso not for avoidance on payment as formerly, but redemption in the modern form, does, strictly speaking, convey the legal title to the property out and out, so as to render a re-assignment necessary in order to re-vest the legal interest in the original assignor. But it is perhaps somewhat difficult to understand how an assignment which, at the time of making it, is expressly subject to a proviso contingently entitling the assignor to call at law for a reconveyance, or which is impliedly redeemable by virtue of the trusts therein expressed, can be regarded as an absolute conveyance, and not to "purport" to be by way of charge. "Purport" would, according to the ordinary and natural acceptation of the term, seem to mean the intention and effect of an instrument to be gathered from its express terms, or necessary implication from its contents viewed as a whole. Even if the instrument contains a proviso, framed according to the modern form, for reconveyance, the assignment would not pass an absolute title in the sense of an unqualified title. In equity, it is submitted that an assignment expressly made subject to redemption on the face of it, "purports to be by way of charge only," and it may further be suggested that, even if there are no such words and no proviso for redemption, according to well-settled rules, the assignment, if made for the purposes of the,

security, would be regarded and treated as such, and not as an absolute assignment^(m) CHAPTER 2

It may be observed that this is not a question of mere legal technicalities which, no doubt, it was one of the objects of this section to do away with. There is a very material distinction between assignments where the assignor parts with the whole of his interest out and out, retaining no right to account or to redeem the property, and so ceases personally to have any concern as to the recovery of the debt, and assignments which are expressly or impliedly subject to account as between assignee and assignor, and redeemable, and where, accordingly, the assignor retains a material interest in the property, in which case it is perhaps not so readily to be presumed that the legislature intended that the assignee should be entitled to sue for the debt without the concurrence of the assignor, unless expressly authorized to do so by the terms of the instrument of assignment.

Although, therefore, the decision in *Tarced v. Delagoa Bay Co* may perhaps be regarded as having the merits of breadth of view, and practical convenience (at all events, from the point of view of a mortgagee), it would seem hardly safe to assume that this decision, and possibly also the decision in *Burhinson v. Hall*, may not be hereafter reconsidered, with different results.

In the present state of the law on the subject, it may be suggested that it will be prudent for mortgagees of debts to insert powers of attorney in their mortgage deeds, and to sue in the names of their assignors pursuant to such powers.

On the assumption, however, that the law is settled by these two decisions, so as to enable mortgagees of debts to sue in their own name upon giving the statutory notice of the assignment to the debtor, the following remarks upon sect 25 of the Judicature Act, 1873, may be useful — Effect of
Judicature
Act, 1873, s
25

1. The section only applies to legal choses in action⁽ⁿ⁾
2. Assignments of equitable choses in action, whether absolute or by way of mortgage, are unaffected by this section of the Act, and can be sued for in all Courts, the assignor and assignee both being before the Court.

3. An assignee for value of legal choses in action not assignable at law, whether by way of charge or not, without writing

(m) See *ante*, p 25

(n) See a definition thereof, 1 Spence's Eq. Jur. 852.

CHAPTER XIX

or notice to the debtor, could, before the Judicature Act, have sued in equity. There is nothing to prevent such assignee now suing in any Court in the same way as he could, before the Act, have sued in a Court of equity.

4. The assignor of an equitable, or of a legal, chose in action, where the Act is not complied with, cannot be joined as complainant in an action without his consent or communication with him, and all terms necessary for his protection from liability being offered to him (o).

5. Under this section the property in the debt and legal chose in action, and the right to sue, vest in the assignee *alone*, subject to the equities, if any, in the section mentioned, which may be proved by parol or verbal evidence.

6. Before the Judicature Act, a verbal assignment of a legal chose in action was valid in equity (p), and it would seem that such an assignment, if for valuable consideration, will now be valid in all the Divisions of the High Court, though not falling within the section. In *Re Richardson* (q), it was stated, *arguendo*, that Kay, J, in the Court below, had expressed the opinion that the effect of the Act was to prevent any interest in a chose in action from passing without an assignment in writing. But his lordship's judgment is not reported, and this point was not dealt with by the Court of Appeal, who affirmed the judgment against the validity of the alleged parol assignment in that case on the ground that it was without consideration.

7. Legal choses in action, which were, previous to the Act, assignable at law by the modes indicated by their special enactments (r), would, it is apprehended, not fall within the section.

8. A cheque is not an assignment under the section (s); but an order to pay a sum out of a debt is an absolute assignment under this section (t); also a debt to become due under a building contract (u); and the assignment is valid against advances subsequently made to the assignor to enable him to complete his contract (u); and payment to the original creditor after notice is bad (u).

(o) *Tinquant v Fearon*, 4 Q B D 280

(p) See *post*, p 1492

(q) 30 Ch. D 396, 397, C A. See also *Re Hancock*, *Hancock v Berney*, W N (1888) 138

(r) See *ante*, p. 305

(s) *Schroeder v Central Bank*, 24 W R. 710

(t) *Brice v Bannister*, 3 Q B D 569, *Buck v Robson*, 3 Q B D 686, overruling *Exp Shellard*, L R 17 Eq 109. See *Fisher v Calvert*, W N (1879) 7

(u) *Brice v Bannister*, *sup*, *Waller v Bradford Old Bank*, 12 Q B. D 511

9 Interpleader will be refused if there has been no written notice of the assignment (x); but it appears that interpleader may be resorted to without waiting for an action to be commenced (y).

10. Claims in respect of policy moneys assigned in terms of the Act, though not within the Trustee Act, 1893 (z), are within this section (a).

SECTION II.

MORTGAGES OF LEGACIES.

Legacies and shares of residue are sometimes the subject of mortgage

A voluntary assignment of all future expectancies would no doubt be invalid as depriving the assignor of all means of living, and it is not clear that an assignment for valuable consideration, as by way of mortgage, of all future property, from whatever source derived, might not be inoperative on the same ground. But such an assignment would be good if it only purports to include property derived from a specified source. So, where, for the purpose of securing a debt, a person executed a deed poll, reciting that he had expectations from relations and friends who might probably bequeath to him legacies or sums of money, and giving his creditor a power of attorney to sue for and receive all legacies or bequests which had already been or might thereafter be given or bequeathed to him by any person whomsoever, it was held that the deed poll created a valid equitable charge operating on future legacies so long as the debt existed (b).

In cases not falling within the Married Women's Property Act, 1882 (c), a married woman cannot dispose of a mere expectancy, either under the Fines and Recoveries Act as regards realty (d), or under Malins' Act (e) as regards personality (f).

(2) *Re New Hamburg, &c. Co.*, W N (1875) 239.

(y) *Lacey v. Wieland*, W. N. (1876) 24

(z) 52 & 53 Vict c 32

(a) *Re Haycock's Policy*, 1 Ch D 611

(b) *Bennett v. Cooper*, 9 Beav 252;
Beckley v. Newland, 2 P Wms 181,
Hobson v. Thoro, 2 P Wms 191;
Wethered v. Wethered, 2 Sum 183,

Harwood v. Tooke, 2 Sum. 192; *Hyde v. White*, 5 Sum 524, *Cook v. Field*, 15 Q B 460, *Re Clarke*, *Coombe v. Carter*, 36 Ch D 348

(c) *Post*, p 335.

(d) *Post*, p 316.

(e) *Post*, p 323

(f) *Allead v. Walker*, (1896) 2 Ch 369

CHAPTER XIX

So a covenant to charge any property which the debtor may become possessed of at his sister's death, was held to be binding, notwithstanding his bankruptcy (*g*)

Where a mortgagor by deed assigned to the mortgagee certain present property, and also "all moneys of or to which he then was or might during the security become entitled, under any settlement, will, or other document, either in his own right or as the devisee, legatee, or next of kin of any person," and also all real or personal property "of, in, or to which he was, or during the security, should become beneficially seised, possessed, entitled, or interested, for any vested, contingent, or any possible estate or interest," the Court refused to give any decision as to whether the general assignment of all property was not void as being too general, but held that in any case the assignment was severable, and that the assignment operated as a valid charge of a share of residuary personalty to which the mortgagor became entitled under the will of a testator who died subsequently to the mortgage (*h*)

Assent of
executor to
legacy

Inasmuch as the law vests all the property of a testator in his executor for the purpose of enabling him to perform his duty of paying the testator's debts, and generally of administering his estate, the assent of the executor is necessary to entitle a legatee to take possession of his legacy, whether general or specific (*i*) It is therefore material for an intending mortgagee of a legacy to ascertain that the executor's assent thereto has been obtained

Notice of
assignment

The mortgagee should also, immediately on completion, give notice of the assignment to the executor, so as to prevent him from paying the legacy to the mortgagor, and also so as to ensure priority over any subsequent incumbrancers. This question will be more fully considered in a later chapter (*j*).

General and
specific
legacies.

A general legacy, though assented to, is an equitable chose in action, for which no action, either of debt or of account generally, lay at common law (*l*) But a specific legacy, after assent, vests at law in the legatee So it was held that a legatee of leaseholds could bring ejectment for them against the executor who had assented to the bequest (*m*); and that a legatee of a specific chattel could maintain trover after assent (*n*).

(*g*) *Lyde v Mynn*, 1 My & K 683

(*h*) *Re Clarke, Coombe v. Carter*, 36 Ch D 348, C. A.

(*i*) *Williams on Executors* (9th ed.), vol. ii p. 1225

(*k*) *Post*, Chap LVI pp 1253 et

seq

(*l*) Co. Lat 89 b, *Deeks v Strutt*, 5 T R 690

(*m*) *Doe v Guy*, 3 East, 120

(*n*) *Williams v. Lee*, 3 Atk. 223.

In regard to the power of attorney, the assignment of a legal debt differs from that of a merely equitable chose in action, such as an interest in a general legacy or a trust fund, in assigning which a power of attorney is useless, and ought not to be, though it sometimes is, inserted (o)

CHAPTER VII
Power of
attorney

Where a person entitled under a will to a share of a fund in the hands of trustees subject to a prior life estate assigned it by way of mortgage, with power for the mortgagee to sue and give receipts in the name of the mortgagor, or otherwise, the trustees of the will, who had notice of subsequent incumbrances on the share, were held not to be bound to pay to the mortgagee the whole amount of the share, but only what was due on his mortgage, according to the settled practice of the Court where a mortgaged fund is in Court (p)

(o) Dav. Conv vol 11 pt 2, p 572

(p) *Re Bell, Jeffery v Sayles*, (1896)
1 Ch. 1, C A

Part III.

AS TO WHO MAY BE MORTGAGORS AND MORTGAGEES, AND
AS TO THE SECURITY AS AFFECTED BY THE ESTATE,
STATUS, AND MUTUAL RELATION OF THE PARTIES.

CHAPTER XX.

OF THE POWER TO MORTGAGE PROPERTY, AND HEREIN OF
DISABILITIES.

SECTION I

WHO MAY BE MORTGAGORS GENERALLY.

Foundation
of right to
mortgage
Feudal re-
strictions on
alienation
of land

THE right of mortgage or conditional sale is obviously dependent on the right of free alienation of property

As regards real estate, burdensome restrictions on alienation, whether by way of sale or mortgage, appear to have been introduced upon the Conquest of England by the Normans. In the twentieth year of William's reign, and on the completion of Domesday-book, he summoned a meeting of all the principal landholders in London and Salisbury, accepted from them a surrender of their lands, and re-granted them on performance of homage and the oath of fealty. The mesne lords, on their subinfeudations, also demanded homage and fealty, and it was held that the bond of allegiance was mutual, each being bound to defend and protect the other. From this flowed the doctrine that the tenant could not transfer his feud without his lord's consent, nor the lord his seignory without his tenant's consent, although the tenants (even of the Crown it should seem) might grant subinfeudations (i. e. to hold of themselves) without licence. It was further held, that the tenant could not subject his lands

to his debts by execution of law, for, if he could, he might have effected that circuitously which he could not by direct means have accomplished. Nor, if the lands came to him by descent, could he alien them without the consent of the next collateral heir (*a*). By these restraints on alienation, mortgages of land must have been nearly extinguished (*b*).

The improving spirit of the age struggled hard against the fetters on alienation, and at length the statute of *Quia Emptores Terrarum* (*c*), passed in the reign of a monarch deservedly styled the English Justinian, gave a general licence of free alienation to all, except the immediate tenants of the Crown, at the same time that it abolished the power of subinfeudation; thus at once simplifying the tenure, and giving freedom to the alienation, of the land of the realm.

Statute *Quia Emptores*

Fines on alienation by tenants *in capite* were not abolished until 12 Car. II. c. 24 put an end to the remaining feudal burdens

On the removal of the restrictions which impeded the circulation of landed property, mortgages of land became general. These restrictions never applied to personalty, including chattel interests in land, to which little importance was attached under the feudal laws.

The result is that, at the present time, all persons beneficially possessed of or entitled to property of any description, real or personal, and not being under any disability, may freely mortgage such property to the extent of their estate or interest therein. The disabilities constituting exceptions to this general rule will be now considered.

All persons not under disability may now mortgage their property.

SECTION II.

MORTGAGES OF PROPERTY OF MARRIED WOMEN.

i.—Disability of Coverture.—Coverture till recently, like infancy or lunacy, constituted a disability which generally prevented a married woman from mortgaging or otherwise dealing with her property, and though this disability is removed

State of the law prior to the Married Women's Property Acts

(*a*) Wright's Ten 168.

(*b*) "Feudalia, invito domino, aut agnatis, non recte subiciuntur hypo-

thecæ, quamvis fructus posse esse, receptum est." Corvini, 268

(*c*) 18 Ed I

CHAPTER XX

by the Married Women's Property Act, 1882 (*d*), in the case of women married on or after the 1st January, 1883, and also in the case of women married before that date so far as relates to property to which they have since become entitled, yet a consideration of the former law is still necessary as regulating cases not coming within the operation of that Act.

General power of wife, with husband's concurrence under 3 & 4 Will IV c 74, s 77, to mortgage realty

ii.—**Mortgages of Real Estate of Married Women.**—By the common law, a wife's real estate is held by her husband in her right during the marriage, and he alone could dispose of the rents and profits. The wife can only dispose of the reversionary interest which would accrue to her if she should survive her husband, subject to his marital rights, and also to his right to curtesy; and even of this interest she can dispose only with the concurrence of her husband. A husband and wife together could, however, effectually convey the lands of the latter to a purchaser or mortgagee by means of a fine duly levied in the Court of Common Pleas. And now by the Fines and Recoveries Act (*e*), s 77, a married woman may, by deed acknowledged by her, with the concurrence of her husband, dispose, by way of mortgage or otherwise, of her estate, whether in possession or reversion, of lands of any tenure, except copyholds in certain cases, and of money subject to be invested in the purchase of lands.

By sect. 1 of this Act it is enacted that—

Definitions of "lands" and "estate" for purposes of the Act.

"In the construction of this Act the word 'lands' shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal and any undivided share thereof, but when accompanied by some expression including or denoting the tenure by copy of court roll, shall extend to manors, messuages, lands, tenements and hereditaments of that tenure, and any undivided share thereof, and the word 'estate' shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien or incumbrance in, upon, or affecting money subject to be invested in the purchase of lands"

Lands devised on trust for sale

The statutory power enables a married woman, with her husband's concurrence, to dispose of her interest in the proceeds

~~(d)~~ 45 & 46 Vict. c. 75, considered
post, p 335

(e) 3 & 4 Will IV. c 74

, even though such proceeds have been properly invested (STATUTE)
 trustees on a mortgage of land (f) devised or settled
 upon trust for sale (g), but she cannot pass such interest except
 by deed acknowledged (h)

Where trustees of a settlement which contained no power Lands &
property
chased
trustees
wife
 to invest in land, in breach of trust invested part of the
 trust funds in the purchase of a house, it was held that the
 married women entitled in remainder under the settlement
 could, by deed acknowledged with the concurrence of their
 husbands, join in disposing of the house so as to bind their
 interests therein (i)

The power of disposition will include a married woman's Interest
mortgage
debt
 interest in a mortgage debt to which she and her husband are
 entitled (k), but not where the wife is interested in such a debt
 as a *cestui que trust*, the legal estate in the mortgaged lands
 being vested in trustees (l).

A husband is not precluded by bankruptcy from concurring Concurr
of bank
husband
 with his wife, under sect. 77 of the Act, in a disposition of her
 interest in real estate (m).

The effect of the Act is only to enable a married woman by Act does
enable r
ried w
to bind l
persona
for pay
of mortg
moneys,
 deed acknowledged, with her husband's concurrence, to bind her
 non-separate real estate, but it does not enable her to enter into
 a personal covenant for payment of principal or interest (n)
 This disability has, however, been removed partially as regards
 mortgages made since 1882, and entirely as regards mortgages
 made on or after the 5th of December, 1893 (o)

A disposition by a married woman, with the concurrence of Bar of v
equity t
settleme
lands
 her husband, under this Act bars her equity to a settlement in
 lands of which she is seised for an estate of inheritance (p).

Where a husband and wife join in a mortgage of the wife's Right o
to redee
 real estate, the wife is entitled to redeem on paying off the

(f) *Miller v Collins*, (1896) 1 Ch 573, C A

(g) *Briggs v Chamberlain*, 11 Ha 69, *Tuer v Turner*, 20 Bea 560, *Smithwick v Smithwick*, 12 Ir Ch R 181, *Williams v Cooke*, 4 Giff 343, *Bouyer v Woodman*, L R 3 Eq 313, *Re Jakeman's Trusts*, 23 Ch D 311

(h) *Frank v. Bollans*, L R. 3 Ch. A 717, *Miller v Collins*, *supra*.

(i) *Re Durrant and Stonor*, 18 Ch D 106, C A

(k) *Williams v Cooke*, 1 Giff 343

(l) *Re Newton's Trusts*, 23 Ch D 181

(m) *Re Jakeman's Trusts*, 23 Ch D 344

(n) *Crofts v Middleton*, 8 De G M & G. 192, *Prude v Bubb*, L R 7 Ch A. 64

(o) See *post*, p 346

(p) *Life Assoc of Scotland v Suddal*, 3 De G F & J 271, *Newnham v Pennington*, 17 L J Ch 99, *Durham v Crickle*, 8 Jur N S 1171

CHAPTER XX

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General power of wife, with husband's concurrence under 3 & 4 Will IV c 74, s 77, to mortgage realty

ii.—**Mortgages of Real Estate of Married Women**—By the common law, a wife's real estate is held by her husband in her right during the marriage, and he alone could dispose of the rents and profits. The wife can only dispose of the reversionary interest which would accrue to her if she should survive her husband, subject to his marital rights, and also to his right to curtesy, and even of this interest she can dispose only with the concurrence of her husband. A husband and wife together could, however, effectually convey the lands of the latter to a purchaser or mortgagee by means of a fine duly levied in the Court of Common Pleas. And now by the Fines and Recoveries Act (*e*), s 77, a married woman may, by deed acknowledged by her, with the concurrence of her husband, dispose, by way of mortgage or otherwise, of her estate, whether in possession or reversion, of lands of any tenure, except copyholds in certain cases, and of money subject to be invested in the purchase of lands.

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~~(d)~~ 45 & 46 Vict c. 75, considered post, p 335

(e) 3 & 4 Will IV c 74

CHAPTER XX

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By sect 1 of this Act it is enacted that—

Definitions of "lands" and "estate" for purposes of the Act

"In the construction of this Act the word 'lands' shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal and any undivided share thereof, but when accompanied by some expression including or denoting the tenure by copy of court roll, shall extend to manors, messuages, lands, tenements and hereditaments of that tenure, and any undivided share thereof, and the word 'estate' shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien or incumbrance in, upon, or affecting money subject to be invested in the purchase of lands"

Lands devised on trust for sale

The statutory power enables a married woman, with her husband's concurrence, to dispose of her interest in the proceeds

~~(d)~~ 45 & 46 Vict c 75, considered *post*, p 335

(e) 3 & 4 Will IV. c 74

of lands, even though such proceeds have been properly invested by her trustees on a mortgage of land (*f*) devised or settled upon trust for sale (*g*); but she cannot pass such interest except by deed acknowledged (*h*)

Where trustees of a settlement which contained no power to invest in land, in breach of trust invested part of the trust funds in the purchase of a house, it was held that the married women entitled in remainder under the settlement could, by deed acknowledged with the concurrence of their husbands, join in disposing of the house so as to bind their interests therein (*i*)

The power of disposition will include a married woman's interest in a mortgage debt to which she and her husband are entitled (*k*), but not where the wife is interested in such a debt as a *cestui que trust*, the legal estate in the mortgaged lands being vested in trustees (*l*)

A husband is not precluded by bankruptcy from concurring with his wife, under sect. 77 of the Act, in a disposition of her interest in real estate (*m*)

The effect of the Act is only to enable a married woman by deed acknowledged, with her husband's concurrence, to bind her non-separate real estate, but it does not enable her to enter into a personal covenant for payment of principal or interest (*n*) This disability has, however, been removed partially as regards mortgages made since 1882, and entirely as regards mortgages made on or after the 5th of December, 1893 (*o*)

A disposition by a married woman, with the concurrence of her husband, under this Act bars her equity to a settlement in lands of which she is seised for an estate of inheritance (*p*)

Where a husband and wife join in a mortgage of the wife's real estate, the wife is entitled to redeem on paying off the

Lands improperly purchased by trustees for wife

Interest in mortgage debt

Concurrence of bankrupt husband

Act does not enable married woman to bind herself personally for payment of mortgage moneys.

Bar of wife's equity to settlement in lands

Right of wife to redeem

(*f*) *Mullen v Collins*, (1896) 1 Ch 573, C A

(*g*) *Briggs v Chamberlain*, 11 Ha 69, *Tuer v Turner*, 20 Bea 560, *Smithwick v Smithwick*, 12 Ir Ch R 181, *Williams v Cooke*, 4 Giff 343, *Bowyer v Woodman*, L R 3 Eq 313, *Re Jakeman's Trusts*, 23 Ch D 344

(*h*) *Frank v Bollans*, L R 3 Ch A 717, *Mullen v Collins*, *supra*

(*i*) *Re Durrant and Stonor*, 18 Ch D 106, C A

(*k*) *Williams v Cooke*, 4 Giff 343

(*l*) *Re Newton's Trusts*, 23 Ch D 181.

(*m*) *Re Jakeman's Trusts*, 23 Ch D 344.

(*n*) *Crofts v Middleton*, 8 De G. M & G 192, *Pride v. Bubb*, L R 7 Ch A 64

(*o*) See *post*, p 346

(*p*) *Life Assoc of Scotland v Siddal*, 3 De G F & J 271, *Newnham v Pinferton*, 17 L J Ch 99, *Dunham v Crackles*, 8 Jur N S 1174

CHAPTER XX

Acknowledg-
ment of deed
by married
woman

mortgage, whether the equity of redemption is expressly reserved to her or not (*q*).

Acknowledgment of a deed by a married woman is essential, as well in equity as at law, to the efficacy of a disposition by her of real estate (*i*).

By sect. 79 of the Act it is enacted that—

Every deed
by a married
woman to be
acknowledged
by her.

“Every deed to be executed by a married woman for any of the purposes of this Act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail (*s*), shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior Courts at Westminster, or before [two of the perpetual commissioners or two special commissioners], to be respectively appointed as hereinafter provided” (*t*).

Memoirandum
of acknow-
ledgment

The Conveyancing Act, 1882 (*u*), s. 7, substitutes for the words above enclosed in brackets the words “one of the perpetual commissioners, or one special commissioner.”

By sect. 84 of the Fines and Recoveries Act, where a married woman acknowledges a deed, the person taking the acknowledgment is to sign a memorandum according to a form given in the section, but for which a different form has now been substituted by the “Rules under the Act for the Abolition of Fines and Recoveries, and sect. 7 of the Conveyancing Act, 1882,” issued in December, 1882 (*x*). And by sect. 7 (2) of the Act of 1882 it is enacted that—

“Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorized to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged”

By sect. 91 of the Fines and Recoveries Act (3 & 4 Will IV. c. 74), it is enacted as follows —

Dispensation
with hus-

“If a husband shall, in consequence of being a lunatic, idiot, or

(*q*) *Stansfield v. Hallam*, 5 Jur N S 1334, *Gleaves v. Payne*, 1 De G J & S. 87, *Re Bolton's Trusts*, L R 12 Eq 553

(*r*) *Williams v. Walker*, 9 Q. B D 776.

(*s*) *Post*, p 371.

(*t*) The appointment of perpetual commissioners is provided for by sect.

81 of the Act, and sect 83 provides for the appointment of special commissioners in cases where married women are prevented by residence beyond seas, illness, &c, from making acknowledgments before a judge or perpetual commissioner

(*u*) 45 & 46 Vict. c. 39.

(*x*) See Rule 3.

of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this Act or otherwise, and all acts, deeds or surrenders to be done, executed or made by the wife in pursuance of such order in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed or made by her in the same manner as if she were a *feme sole*, and when done, executed or made by her shall (but without prejudice to the rights of the husband as then existing independently of this Act) be as good and valid as they would have been if the husband had concurred."

CHAPTER XX
band's con-
currence

The jurisdiction of the Court of Common Pleas under this section has been transferred to the High Court of Justice (*y*), and applications for a dispensation should now be made in the Queen's Bench Division (*z*); but a judge of the Chancery Division has jurisdiction to make a dispensing order, where other relief, properly obtainable in that Division, is sought in the same application (*a*).

Jurisdiction
of the High
Court

Where the husband's concurrence is dispensed with, the wife is for all purposes of disposition a *feme sole*, and the deed need not be acknowledged by her (*b*).

Effect of
dispensing
with hus-
band's con-
currence.

A dispensation may be granted so as to enable a married woman to dispose of her property by way of mortgage (*c*).

Dispensation
for purposes
of mortgage
Dispensation
on ground of
husband's
lunacy

Where a dispensation is applied for on the ground of a husband's unsoundness of mind, it must be shown that such incapacity to concur existed at the time of the application (*d*).

The unsoundness of mind must be clearly proved (*e*), and an affidavit of the fact should be made by a medical man (*f*).

An order has been made under sect. 91 to enable a married woman to convey the legal estate in her separate property where the husband was an infant (*g*).

Dispensation
with consent
of infant
husband.

(*y*) 36 & 37 Vict c 66, ss 16, 34

(*z*) *Re Carne*, 10 Q B D 284

(*a*) *Exp Thompson*, W N (1884) 28, *Re Giles*, W N (1894) 73

(*b*) *Goodchild v Dougal*, 3 Ch D. 650

(*c*) *Exp Thompson*, *supra*.

(*d*) *Re Turner*, 3 C B 166, *Re Murphy*, 4 Man & Gr 635.

(*e*) *Re Murphy*, *supra*.

(*f*) *Re Reeves*, 24 W. R. 848.

(*g*) *Re Haugh*, 2 C. B N. S. 192.

CHAPTER XX

Dispensation
in cases of
divorce and
judicial
separation

The word "divorce" in this section refers to the old divorce *a mensâ et thoro* in the Ecclesiastical Court Under the Divorce Act, 1857 (*h*), a decree absolute for the dissolution of the marriage has the same effect as if the husband had died at the date of the decree *msi* (*i*) Property coming to a wife after a sentence of judicial separation, or (where she has a protection order) after the date of desertion, can be disposed of by her as a *feme sole* (*l*). But a wife judicially separated, or who has obtained a protection order, must apply under this section in order to enable her to dispose of property acquired before the date of such sentence or desertion

Desertion by
husband

Orders under this section have frequently been made in cases where the husband has absconded, and has not since been heard of (*l*); but such orders have been refused where it was no sufficient ground for believing that it was not the husband's intention to return (*m*), and where the husband was in correspondence with his wife (*n*).

Separation
by mutual
consent

When the parties are living apart by mutual consent, and the husband requires a money payment as the price of his concurrence, the Court will make a dispensing order (*o*), but the husband must have been applied to (*p*), and there must be an affidavit by the wife herself (*q*), and it is not sufficient to state that the wife has left the husband on account of his violence, and that he has refused to concur (*r*)

An order under this section does not deprive the husband of his common law rights to the rents and profits of the land during the coverture (*s*)

Exception as
to copyholds

The proviso at the end of sect 77 of the Fines and Recoveries Act renders the formalities prescribed by the Act unnecessary in the case of copyholds where, prior to the Act, the wife, with her husband's concurrence, could have effectually passed the lands by surrender (*t*).

As will be seen later, a wife can by deed, without either

(*h*) 20 & 21 Vict c 85
(*i*) *Prole v Soady*, L R 3 Ch A
220 See *Wells v Malbon*, 31 Beav
48

(*l*) 20 & 21 Vict c 85, ss 25, 26
(*i*) *Exp Gilt*, 1 Bing N R 168,
Exp Shirley, 5 Bing N R 226, *Exp*
Stone, 9 Dowl P C 843, *Anon*, 2
Jur 945

(*m*) *Exp Gilmore*, 3 C B 967, *Exp*
Taylor, 7 C B 1

(*n*) *Re Squires*, 17 C B 176.

(*o*) *Re Woodcock*, 1 C B 437, *Re*
Caine, 10 Q B D 284

(*p*) *Exp Treney*, 1 C B N S 187

(*q*) *Re Williams*, 2 Sc N R 120,

Exp Bruce, 9 Dowl P C 840

(*r*) *Re Price*, 13 C B N S 286

(*s*) *Fowke v Draycott*, 29 Ch D
996

(*t*) See as to the effect of this pro-
viso, *Green v Paterson*, 32 Ch D 95,
C A, and *Carter v Carter*, (1896) 1
Ch 62 (cases of settlements).

acknowledgment or her husband's concurrence, bind in equity real estate limited to her separate use (*u*)

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Acknowledgment of mortgage and other deeds is abolished as to women married after the 1st January, 1883; and in the case of all women married before that date, as to all property the title to which accrues after that date (*x*)

iii.—Mortgages of Chattels Real of Married Women.—A husband is possessed of his wife's chattels real in her right, and is entitled to the rents and profits thereof during the coverture, and he can dispose of such property by deed or otherwise. He can, accordingly, without her concurrence, during the coverture, mortgage or charge *inter vivos* at his pleasure the wife's chattels real, whether her interest be legal or equitable, and so as to bind her absolutely. But they are not the absolute property of the husband; he cannot dispose of them by his will; and if he dies during the coverture, having made no disposition *inter vivos*, they will revert to the wife surviving (*y*). On the death of the wife in the husband's lifetime, he will become entitled to her chattels real, whether settled to her separate use or not (*z*)

Right of husband to wife's chattels real

The husband's power of disposition during the coverture extends to all his wife's chattels real, whether the interest therein be in possession or in reversion, vested or contingent, and the wife surviving will be bound by such disposition, though the husband dies before the reversion falls into possession or the contingency is determined (*a*), provided the interest is such as may possibly vest in the wife in possession during the coverture, but not otherwise (*b*)

Extent of the right

Where a wife's interest in a term of years is reversionary at the time of her death, it is not necessary for her surviving husband to take out letters of administration to her in order to complete his title to the property (*c*).

Where, however, the legal estate of chattels real is in a trustee for the wife, the mortgage, or other disposition thereof, by the

Wife's equity to settlement of chattels real.

(*u*) *Post*, p 328

(*a*) *Post*, pp 335 *et seq.*

(*y*) Co Lit 46 b, 351 a, Bac Abr. tit Baron and Feme (C) 2

(*z*) Wms on Exors, 9th ed, p 605, n

(*a*) *Donne v Hart*, 2 R & M 360, *Purdev v Jackson*, 1 Russ 1,

Hill v. Edmor, 5 De G & S 603, *Hatchell v. Giles*, 1 Ir Ch R 215, *Doe v Lewis*, 11 C B 1035

(*b*) *Duberly v Day*, 16 B & V 33, appealed to D P but appeal not prosecuted, 5 H L C 388

(*c*) *Re Bellamy*, 25 Ch D 620.

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husband will be subject to the equity to a settlement of the wife (*d*)

The concurrence of a wife in a mortgage by her husband of such leaseholds will not bar her equity to a settlement (*d*).

Wife's equity of redemption.

It is a consequence of the right and interest which a wife retains in her chattels real, notwithstanding coverture, that a partial disposition by the husband only operates *pro tanto* to defeat such right and interest; and, accordingly, a mortgage by a husband and wife of the wife's leaseholds was held not to bar her right to redeem during the husband's lifetime (*e*)

Voluntary conveyance of leaseholds by husband overrides mortgage by wife surviving

So complete, however, is the effect of an absolute disposition by a husband of his wife's legal term in diverting the wife's rights, that such a disposition, even if made before the 29th of June, 1893 (*f*), though made without valuable consideration, would not be revoked, by virtue of the statute 27 Eliz c 4, by a subsequent mortgage made by the wife after the death of the husband, but the mortgage would confer no estate to the mortgagee (*g*)

Right of husband to wife's choses in action

iv.—Mortgages of Choses in Action and Reversionary Interests of Married Women—Much discussion formerly arose on the subject of assignments by husband and wife of *choses in action* belonging to the wife. The law was settled before Malins' Act (*h*), and, in all cases not within that Act, is still settled, that an assignment by the husband, or by him and his wife jointly, of *choses in action* of the latter, in possession, expectancy, or contingency, will not be binding on the wife, in case the husband die in her lifetime, and before the fund has been actually reduced into possession (*i*); nor will the consent of the wife be taken in Court, if the *chose in action* be not an immediate present right (*k*); and husband and wife cannot effectually dispose of a life interest of the wife in a fund not settled to her separate use, beyond the

(*d*) *Hansen v Keating*, 4 Ha 1
See *Sturgis v Champneys*, 5 My & Cr 102, and see *post*, pp 326, 327

(*e*) *Hall v Edmonds*, 5 De G & S 603

(*f*) 56 & 57 Vict c 21

(*g*) *Doe d Richards v Lewis*, 11 C B 1035

(*h*) 20 & 21 Vict c 57

(*i*) *Honner v Morton*, 3 Russ 65,
Hornsby v Lee, 2 Madd 16, *Moreau v. Polley*, 1 De G. & S 143, *Pender*

v Jackson, 1 Russ 1, *Ellison v Elwin*, 13 Sim 309, *Harrison v Andrews*, 13 Sim 595, *Ashby v Ashby*, 1 Coll 553, *Wilkinson v Charlesworth*, 10 Beav 324, *Michellmore v Mudge*, 2 Giff 183

(*k*) *Story v Tonge*, 7 Beav 91, *Whittle v Henning*, 18 L J Ch. 51, 12 Jur 1079, 2 Ph 731 And see *Williams v Mayne*, Ir R 1 Eq 519, disapproving of *Wall v Wall*, 15 Sim 513

duration of the coverture (*l*). And if the wife is entitled to stook in possession under a will, and the executors, by direction of the husband, transfer it to trustees to the separate use of the wife, and the husband afterwards becomes bankrupt, such transfer will not, in favour of the assignees, be held a reduction into possession by the husband (*m*)

The rule has been held not to apply to a fund belonging to a married woman standing in the name of the Accountant-General of the Court of Chancery, which, it has been said, may be pledged by the husband alone (*n*). But this, as observed by Mr. Spence, is not consistent with later authorities (*o*)

The wife is entitled by survivorship against the mortgagee, although the agreement for a loan was made before marriage, and although the mortgagee has obtained an order for payment out of the funds in Court between the order *nisi* and order absolute for dissolution of the marriage (*p*)

A mortgage by a husband of a *chose in action* belonging to his wife is not only liable to be defeated in the event of her survivorship, but is also subject to her equity to a settlement (*q*)

Wife's equity to settlement in choses in action

By the statute, commonly called "Malins' Act," power has been given to married women and their husbands to deal with their future and reversionary interests in personal estate. By that statute (*r*) it is enacted that—

Future and reversionary interest in personalty

After the 31st of December, 1857, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever, to which she shall be entitled under any instrument made after the 31st of December, 1857 (except such a settlement as thereafter mentioned), and also to release or extinguish any power which may be vested in, or limited or reserved to, her in regard to any such personal estate, as fully and effectually as she could do as if she

Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their

(*l*) *Stiffe v Everitt*, 1 My & Cr 37. And see *Whitmarsh v Robertson*, 1 Y & C C C 715.

(*m*) *Ryland v Smith*, 1 My & Cr 53. As to what amounts to a reduction into possession of a *chose in action*, see *Blunt v Butland*, 5 Ves 515, *Nash v Nash*, 2 Madd 133, *Gaters v Madeley*, 6 M & W 423, *Hart v Stevens*, 6 Q B 937, *Hanwood v Fisher*, 1 Y & C Ex 110, *Burnham v Bennett*, 2 Coll 254, *Rees v Keith*, 11 Sm 388, though *quere* that case, *Richards v Richards*, 2 B & Ad 447,

Day v Paigrove, 3 M & S 395, *Hansen v Miller*, 14 Sm 22, *Sherrington v Yates*, 12 M & W 855, *Bowston v Williams*, L R 5 Ch A. 555, *Re Barber*, *Dandier v Chapman*, 11 Ch D 442, *Farher v Lechmere*, 12 Ch. D 256.

(*n*) *Sansum v. Dewar*, 3 Russ 91.

(*o*) 2 Spence, Eq Jur 480.

(*p*) *Prole v Soady*, L R 3 Ch A 220.

(*q*) See *Read v Read*, 31 Ch D 402, C A at p 407.

(*r*) 20 & 21 Vict c 57, s 1.

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right to a
settlement
out of such
estate in pos-
session

were a *feme sole*, and also to release and extinguish her right or equity to a settlement out of any personal estate, to which she, or her husband in her right, may be entitled in possession, under any such instrument as aforesaid, save and except that no such disposition, release, or extinguishment shall be valid, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as thereafter directed. Provided always that nothing in the Act contained shall extend to any reversionary interest, to which she shall become entitled by virtue of any deed, will, or instrument, by which she shall be restrained from alienating or affecting the same

Deeds to be
acknow-
ledged

By sect 2, every deed under the Act must be acknowledged in manner required by 3 & 4 Wm IV c 74, as modified by the Conveyancing Act, 1882 (s), for disposing of interests in land in England or Wales, or by 4 & 5 Wm. IV c 92, as to Ireland; and the provisions of the Acts of Wm IV for dispensing with the concurrence of husbands, are applicable to dispositions of interests in personal estate under this Act (t)

The powers of
disposition
given by this
Act not to
interfere with
any other
powers

Sect 3. The powers of disposition given to a married woman by this Act, shall not interfere with any power which, independently of this Act, may be vested in, or limited, or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act, she may be prevented from doing so in consequence of such power having been suspended or extinguished by such disposition

Act not to
extend to
settlements
on marriage

Sect 4. The powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement, or agreement for a settlement, made on the occasion of her marriage

Effect of
disposition

A disposition under this Act is that of the married woman, not of her husband, and accordingly the concurrence of the husband does not let in any claims against him. So, where a reversionary legacy was given to a married woman, whose husband was indebted to the testator, a deed, duly acknowledged under the Act, deprived the executors of any right of retainer of the debt (u).

What prop-
erty passes
by the dis-
position.

A married woman can, under this statute, dispose only of property coming to her under an "instrument," and therefore not of a reversionary interest derived under an intestacy. The instrument must not have been made on or before the 31st of

(s) 45 & 46 Vict c 39

(t) See *Exp Thompson*, W.N (1884)

28

(u) *Re Batchelor, Sloper v Oliver*,
L R 16 Eq 481 See *Re Jakeman's*
Trusts, 23 Ch D. 344

December, 1857; so, where a married woman claimed under an appointment executed since the Act came into operation, in exercise of a power created before the Act, it was held that the instrument under which she was entitled, was the instrument creating the power, not the instrument executing it (x). And where a reversionary interest in personalty was given to a married woman by will made before the commencement of the Act, and an additional legacy was given to her by a codicil made after that date, it was held that the "instrument" under which she took the reversionary interest was the will (y).

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The words "any personal estate whatsoever," in sect 1 of the Act, include a legal *chuse in action*, such as a policy of life assurance effected in a married woman's own name, and are not to be confined to equitable *chuses in action*, such as a legacy or other money or securities held in trust for her (z).

Policy of
assurance

The statutory power of disposition given by this Act applies only to future and reversionary interests in personalty, and does not enable a married woman absolutely to dispose of a *chuse in action* to which she is entitled in possession, but the Act seems indirectly to enable a husband and wife together to deal with such property, by empowering her to release her equity to a settler out of it, so as to entitle the husband to reduce it into possession by requiring it to be transferred to him, thus excluding the wife's claim by survivorship (a).

*Chuses in
action in
possession*

The observance of the formalities prescribed by this Act is by sect 3 rendered unnecessary in the case of a disposition by a married woman in exercise of a power conferred on her by a settlement or will, or by a statute; and is manifestly unnecessary in the case of dispositions of property which is made the separate property of a married woman by statute (b), nor does the Act apparently apply to future and reversionary interests in personalty which, if in possession, could be assignable by her without the husband's concurrence.

Appointments
under powers,
and separate
property

An agreement in contemplation of marriage dealing with a reversionary interest, is within the proviso in sect 4; a contingent interest under the agreement was held not to be a

Exception of
settlements

(x) *Re Butler's Trust*, 1r Rep 3 Eq 138 See *Clarke v Green*, 2 H & M 474

363 (a) See Lewin on Trusts (8th ed), p 23

(y) *Re Eloom, Layborn v Grover Wright*, (1894) 1 Ch 303, C A

(b) See 33 & 34 Vict c 93, and 45 & 46 Vict c 75, *post*, pp 333 and 335

(z) *Witherby v Rackham*, 39 W R

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resulting trust, but to be an interest which accrued under the settlement (*c*)

foreign
domicile

Where a married woman is domiciled abroad, the efficacy of a disposition of her interest in personal property depends on the law of her domicile (*d*)

statement of
the doctrine

v.—Wife's Equity to a Settlement.—The husband's power to mortgage his wife's property and his interest therein is, as a general rule, subject to her equity to a settlement. The rule is thus stated by a learned writer—"Wherever the husband is obliged to seek the aid of equity in order to get the benefit of his wife's property, the assistance of the Court is withheld until a provision for the wife is secured, if she requires it" (*e*). And the rule, of course, applies equally to assignees of the husband, who cannot stand in a better position than their assignor. This rule, however, will not apply where the husband or his assignees can render the property available without resorting to the aid of equity (*f*).

With regard to this equity, the following propositions may be here stated:—

1 As against a general assignee it attaches on the wife's equitable life interest, in real and personal estate (*g*), to the same extent as on her capital (*h*), but no settlement will be made of it, if the husband is living with and maintaining his wife out of it though he may be in embarrassed circumstances (*i*).

2 It attaches on a legacy charged on land (*k*).

3 It attaches on an equitable interest in leaseholds (*l*).

4 The equity of a married woman attaches whether the property vests in her before or after marriage (*m*); and it is enforceable as soon as the property of which she claims the equity is actually in possession, although not actually distributable (*n*).

(*c*) *Clarke v Green*, 2 H & M 474

(*d*) *Guernette v Young*, 4 De G & S 217, *Duncan v Cannan*, 18 Beav 128

(*e*) Macqueen, Husband and Wife, 2nd ed p 71, cited with approval by Jessel, M R, in *Ward v Ward*, 14 Ch D 506, at p 508. And see *Lady Elbank v Montolieu*, 5 Ves 737, *S C*, 1 White & Tudor L C (6th ed.) 486

(*f*) *Gleaves v Fane*, 1 De G J & S 87, at p 94

(*g*) *Sturgis v Champneys*, 5 My & Cr 197, *Tidd v Lister*, 3 De G M. &

G 857, *Wilkinson v Charlesworth*, 10 Beav 326, *Barnes v Robinson*, 9 Jur N S 245

(*h*) *Taunton v Morris*, 11 Ch D 779, C A. See *Vaughan v Buck*, 13 Sim. 404

(*i*) *Vaughan v Buck*, *sup*

(*k*) *Duncombe v Greenacre*, 2 De G. F & J 509

(*l*) *Hanson v Keating*, 4 Ha 1.

(*m*) *Barrow v Barrow*, 18 Beav 529

(*n*) *Re Robinson's Settled Estate*, 12 Ch D 188

5. The wife may herself obtain this equity in a suit by her against her husband, or his assignees, and not merely when defendant (*o*).

6 The equity for a settlement is effectual against a mortgagee, as well as against the trustee in bankruptcy of the husband (*p*)

7. The equity does not attach where she is seised of the inheritance (*q*).

8 But where the wife has a legal, and not an equitable, estate, an outstanding term gives her the same privilege, as to this right to a settlement, as if her estate were equitable (*r*)

9 Where a husband mortgages leaseholds which he possesses in right of his wife, and the mortgagee, having the legal interest, brings an action to foreclose, the wife has no equity to a settlement (*s*)

10 The equity does not attach against the assignee for value of her equitable life interest in real or personal estate, whether it be immediate or reversionary, where, at the time of the assignment, the husband was willing and able to maintain her; and her equity cannot be revived by the husband's subsequent refusal or neglect to do so (*t*)

11 Nor upon past income, over which the husband's mortgage will prevail (*u*).

12. Nor upon the property specifically excepted out of the settlement (*x*).

13. Nor upon property for the recovery of which the husband alone has a right to sue (*y*)

14 Nor upon property in which the husband and wife have an interest as joint tenants (*z*)

15. The wife is empowered, under 20 & 21 Vict c. 57, to release her equity to a settlement out of such personal estate as falls within the Act, in manner therein mentioned (*a*)

(*o*) *Lady Elibank v Montolieu*, 5 Ves 737, *Sturges v Champneys*, 5 My & Cr 197, *Gardner v Marshall*, 14 Sim 475, *Duncombe v Greenacre*, *sup*, *Giacommetti v Prodgers*, L R 8 Ch A 338, *Ruffles v Alston*, L R 19 Eq 539
(*p*) *Macaulay v Philips*, 4 Ves 15, *Scott v Spashett*, 3 Mac. & G 599, at p 603

(*q*) See cases cited, *ante*, p 317, note (*p*), see also *Ward v Ward*, 14 Ch D 506, *Re Bryan*, 14 Ch D 516

(*r*) *Nevenham v Pemberton*, 17 L J Ch 99

(*s*) *Hill v. Edmonds*, 5 De G & S

603, *Hatchell v Egglese*, 1 Ir Ch R 215

(*t*) *Wright v Morley*, 11 Ves 12, *Elliot v Cordell*, 5 Madd 149, *Stanton v Hall*, 2 R & My 175, *Tidd v Lister*, 3 De G M & G 857

(*u*) *Newman v Wilson*, 31 Beav 34, *Re Carr's Trusts*, L R 12 Eq 609

(*x*) *Brooke v Hukes*, 12 W R 703

(*y*) *Ibid*

(*z*) *Ward v Ward*, 14 Ch D 506, *Re Bryan, Godfrey v Bryan*, 14 Ch D 516

(*a*) *Ante*, p 323

CHAPTER XX.

vi.—Trusts for separate Use of Married Women.—Independently of the statutory enactments which have been considered

Power of married woman to dispose of property limited to her separate use

whereby the difficulties which the common law imposed upon dispositions by married women were in some measure removed, those difficulties were got over in two ways —(1) By the creation of a separate estate for her independent of the control and liabilities of her husband; (2) by appointments under powers

Nature of trusts for separate use

Trusts for the separate use of married women were recognized in early times by the Court of Chancery (*b*), and apparently also, to some extent, by the Courts of Common Law (*c*). The effect of such trusts is not only to secure to a wife the enjoyment of the property so settled free from the control of her husband, and without being liable to his debts and engagements, but also to enable her (unless restrained from anticipation) effectually to dispose of her interest therein without any necessity for his concurrence

What words will create a separate use

Questions have frequently arisen as to what words are sufficient to create a trust for the separate use of a married woman. The word "separate" is the proper technical term for excluding the marital right; but it is sufficient if an intention to give property to the separate use of a married woman is clearly indicated by the instrument creating the trust (*d*).

Mode of creating a separate use

The proper mode of creating a separate use in favour of a married woman is to vest the property in trustees upon a trust for that purpose, but if the property is not so vested, the trust will not be allowed to fail for want of a trustee, but the property will vest in the husband during the continuance of the coverture as trustee for the separate use of his wife (*e*)

Separate use generally attaches on any coverture

It is now settled, that where property is limited to the separate use of a woman, whether married or unmarried, the separate use takes effect so long, and as often, as she is in the state of marriage; and therefore, during such time, she may charge and incumber it at her pleasure, and if a clause against anticipation is added, that equally operates whenever she is not sole, so as to give her the present enjoyment of an inalienable estate, inde-

(*b*) Pre Ch 26, 44

(*c*) *Bush v Allen*, 5 Mod 63 See *Duncan v Cashan*, L R 10 C P 554

(*d*) As to what expressions are sufficient to create a separate use, see the note to *Jarman on Wills*, 5th ed p 880 See also *Vaizey on Settlements*,

vol 1 pp 753 *et seq*, *Lewin on Trusts* (8th ed), pp 755 *et seq*, *Godefron on Trusts* (2nd ed), pp 552 *et seq*

(*e*) *Bennet v Davis*, 2 P Wms 316, *Roth v Cockell*, 9 Ves 369, 375, *Ashworth v Outram*, 5 Ch D 923, 941, C A, *Fox v Hawks*, 13 Ch D. 822

pendent of her husband, but in either case she has full power of disposition whilst she is single (*f*)

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Where an estate for separate use or separate use with restriction against anticipation is given generally, subsequent words which appear to point to a present or future coverture only, are treated as superfluous, and the separate use applies to all covertures (*g*)

Where an estate for life (*h*) or in fee (*i*) is limited to a married woman for her separate use, she has a complete right of disposition thereof, by deed or will, and, accordingly, she can alienate that estate, independently of the Fines and Recoveries Act (*k*), without the concurrence of her husband, and without any acknowledgment. An instrument disposing of a wife's separate estate, real or personal, and executed by her, effectually conveys her equitable interest, and operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction, and the trustees are bound to convey accordingly (*l*), and when the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity (*m*). If the legal estate is vested in the wife, it can only be effectually conveyed by the wife with her husband's concurrence by deed acknowledged. The Married Women's Property Act, 1882 (*n*), does not alter the powers of a married woman over her separate estate, not being her separate property, by virtue of the Act (*o*)

Effect of trust for separate use

A married woman may create a valid charge upon her separate property without expressly charging it in terms (*p*), but the mere fact of her being a party to a deed by which her husband alone assigns property limited to her separate use, but without any disposition by her, or any recital or covenant on her part indicating an intention to charge her interest will not bind such interest (*q*)

- (*f*) *Tullett v Armstrong*, 4 My & Cr 377
- (*g*) *Steedman v Poole*, 6 Ha 193, *Re Gaffee*, 1 Mac & G 541, *Hawkes v Hubback*, L R 11 Eq 5, *Re Molyneux's Estate*, Ir R 6 Eq 411
- (*h*) *Parkes v White*, 11 Ves 209, *Acton v White*, 1 S & St 429, *Glyn v. Baxter*, 1 Y & J 329
- (*i*) *Taylor v Meads*, 4 De G J & S 597, *Atchison v Le Mann*, 23 L T 302, L JJ, *Hall v Waterhouse*, 11 Jur N S 361, *Blatchford v Woolley*, 2 Dr & S 204, 206, *Pride v Bubb*, L R 7 Ch A 64
- (*k*) 3 & 4 Will IV c 74, *ante*, p 316
- (*l*) See *Peters v Lewis & East Grinstead Earl Co*, 18 Ch D 429, C A
- (*m*) See *per Lord Westbury in Taylor v Meads*, 4 De G J & S 597, at p 684
- (*n*) 45 & 46 Vict c 75, *post*, p 335
- (*o*) See *Re Harris' Settled Estates*, 28 Ch D 171
- (*p*) See *Crosby v Church*, 3 Beav 489.
- (*q*) *Tullett v Armstrong*, 4 My &

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Reversionary
Interests

A married woman, unless restrained from anticipation, can generally dispose of a reversionary interest settled to her separate use in realty (*v*), or personalty (*s*); but it seems doubtful whether she can do so if the reversionary interest is contingent (*t*), or an interest which cannot by any possibility arise during the coverture (*u*). So, also, the trust for separate use may be so framed as not to attach to the interest of a married woman till the happening of a future event, in which case she cannot dispose of such interest until the event happen (*x*)

Savings by
Married
Women

Savings, during coverture, from separate estate, and investments thereof in stock or furniture, are separate estate (*y*), although the stock were purchased by the husband (*z*), but not savings during discovery (*a*). Shares in a company purchased by a wife out of savings, are separate estate, and the husband is not a contributory (*b*)

Since the Judicature Act (*c*), the decisions at common law, in respect of savings, and property purchased with them (*d*), will no longer apply. The rule in equity must be followed, as it was before the Act upon an interpleader rule (*e*).

Bar of estate
tail

Where an estate tail is limited to the separate use of a married woman, she may bar the entail, and dispose of the estate, free from any curtesy of her husband, but his consent is required by the Fines and Recoveries Act (*f*), under which alone she can bar the entail, and is necessary, notwithstanding that the estate is limited to her separate use; and even if there is a clause against anticipation covering the entail, she may still bar the entail, although she cannot dispose of the estate, or its income (*g*)

Covenant to
settle after-

Separate property of a married woman has been held not to be subject to a covenant by the husband alone for the settle-

Cr 377 See also *Callow v Howle*, 1 De G & S 531

(*v*) *Major v Lansley*, 2 R & M 355

(*s*) *Sturgis v Corp*, 13 Ves 190

(*t*) *Mara v Manning*, 2 J & L 311, *Lechmere v Brothridge*, 32 Beav 353

(*u*) *Bestall v Bunbury*, 13 Ir Ch 315, 549

(*x*) *King v Lucas*, 23 Ch D 712, C A

(*y*) *Neulands v Paynter*, 4 My & Cr 408, *Brooks v Brooks*, 25 Beav 342, *Molony v Kennedy*, 10 Sim 254, 255, *Haddon v Fladgate*, 27 L J P D & A 21, *Barriach v McCulloch*, 3 K & J 110; *Darkin v Darkin*, 17 Beav 578, *Humphrey v Richards*, 2 Jur N S 432, *Haselinton v Gull*, 3

T R 620, n

(*z*) *Lloyd v Solicitors, &c Life Assurance*, 29 L T 102

(*a*) *Spicer v Spicer*, 24 Beav 365

(*b*) *Re Fire Insurance Corp*, W N. (1883) 94

(*c*) 36 & 37 Vict c 66, s 25, subs 11

(*d*) *Caine v Brice*, 7 M & W 183, *Tugman v Hopkins*, 4 Man & Gr 401, *Messenger v Clark*, 5 Exch 388, *Burd v Pegrum*, 13 C B 639

(*e*) *Duncan v Cashin*, L R 10 C P 554, *Engelback v Nixon*, L R 10 C P 645

(*f*) 3 & 4 Will IV c 74 See *post*, p 368

(*g*) *Cooper v Macdonald*, 7 Ch D. 288, C A.

ment of the wife's future property (*h*), nor is an estate tail(*i*); but if a covenant to settle after-acquired property is entered into both by the intending husband and the intending wife, it will bind her so as to compel her to settle it (*k*); and a declaration in a will that the property shall not be settled is disregarded (*l*).

By the Matrimonial Causes Act, 1857 (*m*), in case of judicial separation or desertion, all property which the wife may acquire or which may come to or devolve upon the wife belongs to her, as a *feme sole* (*n*), although there is a clause against anticipation (*o*), and although the property, which had been vested before, had not been reduced into possession until after the desertion (*p*), and the property of which she has so become possessed as a *feme sole* becomes, on resumption of cohabitation, her separate property (*q*).

In case of desertion, and an order for protection of the earnings and property of the wife, her property, in remainder or reversion, at the date of the desertion, or decree for judicial separation, is included therein (*r*). The wife is entitled to reversionary personalty, which she and her husband had mortgaged, as soon as it falls into possession (*s*).

Under a protection order, property of which the wife is trustee is not included (*t*).

Nor does the statute apply so as to include property to which a married woman had become entitled previously to the separation or desertion. Thus, where a married woman, entitled to an equitable life interest in realty for her separate use without power of anticipation, was deserted by her husband and obtained a protection order; she subsequently mortgaged her life interest, it was held that as regarded the property in question, not being property acquired by her or which had come to or devolved upon her after the desertion, the restraint on anticipation prevailed notwithstanding the order (*u*).

(*h*) *Dawson v Tredwell*, 18 Ch D 358, C A. See *Re Mannwaring's Settlement*, L R 2 Eq 487.

(*i*) *Hilber v Parkinson*, 25 Ch D 200.

(*k*) *Re Allnutt, Pitt v Brassey*, 22 Ch D 275. *Re Currey, Gibson v Way*, 36 Ch D 391.

(*l*) *Schofield v Spooner*, 26 Ch D 94.

(*m*) 20 & 21 Vict c 85, s 25.

(*n*) *Re Ford*, 32 Beav 621, *Bathe v. Bank of England*, 4 K. & J 564, *Whittingham's Trusts*, 10 Jur N. S. 813, *Insole's Trust*, L R 1 Eq 470, *Johnson v Lander*, L R. 7 Eq 228, M. R.

(*o*) *Cooke v Fuller*, 26 Beav 99, *Munt v Glynes*, 41 L J Ch 639.

(*p*) *Re Coward and Adams' Purchase*, L R 20 Eq 179, *Nicholson v Drury Building Estate Co*, 7 Ch D 48.

(*q*) *Re Emery's Trusts*, 32 W R 357.

(*r*) 21 & 22 Vict c 108, s 8.

(*s*) *Re Insole*, L R 1 Eq 470. See *Whittingham's Trusts*, 10 Jur N S 818, *Re Coward and Adams' Purchase*,

sup (t) *Kingsman v Kingsman*, 6 Q B D 122, C A.

(u) *Hull v. Cooper*, (1893) 2 Q B. 85, C. A.

CHAPTER XX

Married woman may exercise power of appointment over realty by deed acknowledged

Copyholds

Legal estate

Misrepresentation as to power

Appointments of personalty

Payment of interest on void mortgage

Release of powers by married woman as regards land

vii.—Appointments under Powers—A married woman can, independently of any statutory enactments, exercise a power of appointment whether relating to land or simply collateral (*y*); her husband's concurrence is not necessary for this purpose (*z*), unless required by the terms of the power (*a*), and inasmuch as sect 78 of the Fines and Recoveries Act (*b*) expressly provides that the powers of disposition given to married women by that Act shall not interfere with any other powers which they had before the Act, it is obvious that the instrument whereby the power is exercised does not require acknowledgment. This rule applies to copyholds as well as freeholds (*c*).

The exercise by a married woman of a power of appointment over land in favour of a mortgagee or purchaser will pass the legal estate unless outstanding (*d*).

Where a married woman joined her husband in a mortgage of an estate by deed, which represented her to have a power of appointing the fee, though, in fact, the estate was settled to her separate use for life with remainder to the husband for life with remainder over, it was held that the mortgagee was not debarred from enforcing his security against her life estate (*e*).

A married woman may also exercise a power of appointment over personalty whether in possession or reversionary (*f*), and an appointment of a future or reversionary interest will not require acknowledgment under Malins' Act (*g*).

Where a mortgage is void by reason of the defective exercise of a power by a married woman, payment by her of interest for many years will not render the mortgage binding on her (*h*).

A married woman might formerly have extinguished a power affecting land by fine or recovery (*i*); and by sect 77 of the Fines and Recoveries Act (*j*) a married woman is empowered to release, surrender, or extinguish any power which may be vested in, limited, or reserved to her in regard to lands of any tenure, or any money subject to be invested in the purchase of lands,

(*y*) *Lady Travel's Case*, cit 3 Atk 711, *Peacock v Monk*, 2 Ves Sen 191. See Sug Powers, 8th ed p 153.

(*z*) *Doe d Blomfield v Eyre*, 5 C B 713.

(*a*) *Antrim v Buckingham*, 1 Ch Ca 17.

(*b*) 3 & 4 Will IV c 74.

(*c*) *Driver v Thompson*, 4 Taunt 294.

(*d*) *Wright v. Lord Cadogan*, 2 Ed 239 252. See *Field v Moore* 7 D & G

M & G 691, 703.

(*e*) *Wainwright v Hardisty*, 2 Beav 319.

(*f*) See *Wood v Wood*, L R 10 Eq 220, *Greenhill v North British and Mercantile Insurance Co*, (1893) 3 Ch 474.

(*g*) 20 & 21 Vict c 27, s 3, ante, p 324.

(*h*) *Blandy v Kimber*, 24 Beav 148.

(*i*) Sug Powers, 8th ed p 92.

(*j*) 3 & 4 Will IV c 74.

provided her husband concur in the deed and that the deed be duly acknowledged

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By sect 1 (k) of Malins' Act, a married woman is empowered in like manner to release or extinguish any power over a future or reversionary interest in personalty, unless she is restrained from alienating the same

Release of power over personalty

By sect 52 of the Conveyancing and Law of Property Act, 1881 (l), a person to whom a power, created either before or after the Act, whether coupled with an interest or not, is given, may by deed release or contract not to exercise the power. But this section has been said to be merely declaratory (m), and though a married woman is no doubt a "person," yet it would seem hardly safe to assume that she could release her power over land or reversionary personalty except with her husband's concurrence and by deed acknowledged (n)

Whether release must be acknowledged

Sect. 6 of the Conveyancing Act, 1882 (o), enables a person to whom a power, created before the Act, is given, whether coupled with an interest or not, by deed to disclaim such power, and the above remarks seem also to apply to this enactment.

The Married Women's Property Act, 1882 (p), does not seem to affect the question whether a release or disclaimer by a married woman under these sections must be by deed acknowledged, as, though it enables a married woman freely to dispose of property, it nowhere expressly enables her to release or disclaim a power as if she were a *feme sole* (q).

viii.—Mortgages under the Married Women's Property Act 1870.—Under the Married Women's Property Act, 1870 (r), the power of a married woman to mortgage, or otherwise dispose of, property was extended. By it the following property, acquired by a woman after the Act, whenever married, was declared to be her separate property, viz —

1 Earnings in her separate trade or employment (s. 1).

(l) See section set out, *ante*, p. 323.

(i) 44 & 45 Vict. c. 41

(m) *Per North in Re Radcliffe, Radcliffe v. Beues*, (1891) 2 Ch. 662, at p. 670

(n) See *Wolst. Conv. and S. L. Acts* (7th ed.), p. 108. Mr. Farwell thinks differently, see *Powers* (2nd ed.), p. 117

(o) 45 & 46 Vict. c. 39

(p) 45 & 46 Vict. c. 75, *post*, p. 335

(q) See *Re Davenport, Turner v.*

King, (1895) 1 Ch. 361, and as to the distinction between "property" and "power," see *Exp. Galehrst, Re Armstrong*, 17 Q. B. D. 521, C. A., *Re Roper, Roper v. Doncaster*, 39 Ch. D. 432.

(r) 33 & 34 Vict. c. 93. This Act is repealed (except as to acts done, rights acquired, or liabilities incurred) by the Married Women's Property Act, 1882, *post*, pp. 335 *et seq.*

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- 2 Deposits in savings banks in her name, except investments made with the money of her husband, without his consent (s 2).
- 3 Subject to a similar exception (s 3)
- 4 Shares or stock in joint stock companies or societies, subject to a similar exception (ss 4 and 5)
- 5 Policies of insurance effected by her on her life, or that of her husband, expressed to be for her separate use, or effected by her husband for her separate use (s) (s 10)
But creditors' rights were preserved, in case of fraud (ss 6 and 10).
And in the case of a woman married after the passing of the Act —
- 6 Personal property, to which she became entitled as next of kin of an estate, without restriction as to amount (t) (s 7).
7. Any sum of money, not exceeding 200*l*., to which she became entitled under any deed or will (s 7)
8. Rents and profits of real estate descending on her as heiress (s 8).
But subject, in all these cases, to any settlement affecting the same.

It followed that a married woman could dispose of any chose in action, or reversionary interest, devolving upon her, as next of kin

A business carried on by a married woman after her marriage, in the same way as before, was held to be her separate property under the Act (u)

The separate estate of a married woman in earnings under the Act, became, upon her death, equitable assets, and divisible amongst her creditors, *pari passu*, so that her executor had no right to retain in full his own debt thereout (x)

Stocks and funds must have been transferred into her name, in manner directed by sect. 3 (y), though her husband had deserted her (y).

A policy of insurance, effected in the name of a married woman

(s) See *Holt v Everall*, 2 Ch D 266, C A., *Mellor's Policy Trust*, 6 Ch D 127, S C 7 Ch D 200

(t) *King v Voss*, 13 Ch D 504

(u) *Ashworth v Outram*, 5 Ch D. 923, C A., *Lovell v. Newson*, 4 C P.

D 7 See *Re Whitaker*, 21 Ch D 657

(x) *Re Poole's Estate*, *Thompson v. Bennett*, 6 Ch D 739

(y) *Howard v Bank of England*, L. R. 19 Eq 295

to her separate use, by her husband, although in embarrassed circumstances, belongs to her (z); and when effected for the benefit of the wife and children belongs to her for her life with remainder to her children (a).

In an action to charge the wages and earnings of the wife, under the late Acts, the husband was a necessary party defendant (b).

Under the Married Women's Property Act, 1882, a married woman may be sued alone, although in respect of a contract made before the Act came into operation (c).

A woman whose husband is alive is liable to the extent of her separate estate to support her children, without prejudice to the liability of her husband, the same as a widow is liable (d), but she was not so liable in respect of her grandchildren until the Act of 1882, s 21 of which expressly extends the liability to include them.

ix.—Mortgages under the Married Women's Property Act, 1882—Since the 1st January, 1883, the Married Women's Property Act, 1882 (e), has introduced important changes in the law in regard to the power of a married woman to dispose of her property (f) by way of mortgage, or otherwise, the effect of the Act in this respect is to introduce, instead of the old separate use in equity, a statutory separate property at law, as to which the married woman has all the powers of a *feme sole*.

By sect. 1 (1) thereof it is enacted as follows —

A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing, by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee

Married woman to be capable of holding property as a *feme sole*.

This enactment is to be construed along with sects 2 and 5 of the Act (stated below), and does not give to a married woman power to dispose of property not falling within the two latter

(z) *Holt v Everall*, 2 Ch D 66

(a) *Re Adams' Policy Trust*, 23 Ch D 525, *Chitty, J.*, not following *Mellor's Policy Trust*, 6 Ch D 127, 7 Ch D 200, V-C Malins

(b) *Hancock v Demeria-Lablaque*, 3 C P D 197 See also 37 & 38 Vict c 50, s 1

(c) *Gloucestershire Banking Co v. Phillips*, 32 W R 522

(d) 33 & 34 Vict c 93, s 14, *Coleman*, app *Overseers of Birmingham*, resp 6 Q B D 615

(e) 45 & 46 Vict c 75

(f) "Property" in this Act includes a thing in action See s 24

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sections; her power of disposing of such property is still regulated by the old law (*g*)

The main object of this sub-section is "to introduce an entirely new right in married women to relieve them from the necessity of having a trustee, and to say that they shall, as provided in the subsequent part of the Act, have power to acquire, hold, and deal with real and personal property without the intervention of a trustee" (*h*)

Under a marriage settlement made in 1878, a widow was entitled for her life to the income of a fund, with power to appoint the property by deed or will while discoverd, and in default the *corpus* was held in trust for her absolutely; she married again after the commencement of the Act, it was held that, inasmuch as, before her second marriage, she would have been entitled to have the *corpus* of the fund transferred to her absolutely, her interest therein became upon her second marriage her "separate property" by virtue of the Act, so that she was notwithstanding her marriage entitled to an absolute transfer of the fund without releasing her power (*i*)

Property of
a woman
married after
the Act to be
held by her as
a *feme sole*

Sect. 2 Every woman who marries after the commencement of this Act, shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill

Property
acquired after
the Act by a
woman
married before
the Act to be
held by her as
a *feme sole*

Sect. 5 Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money and property so gained or acquired by her as aforesaid.

From these enactments it is manifest that all women married after the 1st of January, 1883, have over all their property the same disposing powers, both at law and in equity, as *femes sole*. For the conveyance of real property, to which a married woman is beneficially entitled under the statute, neither the concurrence of

(*g*) *Re Cuno, Mansfield v Mansfield*, 43 Ch D. 12, C A. See also *Re Harris' Settled Estates*, 28 Ch D 171.
(*h*) *Per Cotton, L J*, *ibid* at p 16
See *Hope v Hope*, (1892) 2 Ch. 336,

341

(*i*) *Re Onslow, Plowden v. Gayford*, 39 Ch D 622 See *Re Davenport, Turner v King*, (1895) 1 Ch 361.

the husband nor acknowledgment under the Fines and Recoveries Act, nor separate examination in Court, will be required (*l*). So it was held that a married woman married since 1882 might enlarge a base fee created by her before her marriage without the concurrence of her husband or acknowledgment (*l*). Similarly, the protection of Malins' Act (*m*) over reversionary interests in personalty is dispensed with, and such, unless protected by settlement, may be aliened at the married woman's sole discretion without deed acknowledged or separate examination.

Women married before the 1st of January, 1883, may similarly and without restriction deal with all property their title to which accrues after that date. The title to a reversionary interest, whether vested or contingent, is deemed to "accrue" when such title was first acquired, not when it falls into possession (*n*); but a mere "*spes successionis*" is not a title to property (*o*).

It follows that the doctrine of an equity to a settlement, for the future, only applies in the case of property vested but not in possession of women married before the commencement of the Act.

But the Act does not empower a woman, though married since the 1st January, 1883, who is a trustee for sale of land, to convey to a purchaser, except by deed acknowledged, and with the concurrence of her husband (*p*).

Married
woman
trustee

By sect 6, the principle of the Act is applied to all deposits in post office and other savings banks, annuities, and sums forming part of the public or other stocks and funds, and all shares, stocks, debentures, debenture stocks, or other interest of or in any corporation or company, which, on the 1st of January, 1883, were standing in the name of a married woman so as to render such deposits, &c, presumably her separate property, unless the contrary is shown; sect 7 has similar application to the like investments allotted or transferred to a married woman after that date. Sect. 8 extends the provisions of the two preceding sections to investments standing in the joint names of a married woman and any person or persons other than her husband; and by sect 9, any such investments as aforesaid are transferable by

As to stock,
&c to which
a married
woman is
entitled

(*l*) *Riddell v Errington*, 26 Ch D. 220

(*l*) *Re Drummond and Dave's Contract*, (1891) 1 Ch 524

(*m*) 20 & 21 Vict c 57

(*n*) *Reid v Reid*, 31 Ch D 402,

C A., *Re Dixon, Dixon v Smith*, 35 Ch D 4, C A

(*o*) *Re Parsons, Stockley v. Parsons*, 45 Ch D 51

(*p*) *Re Harkness and Allsopp's Contract*, (1896) 2 Ch 358 See s 18, *inf*.

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the married woman alone, or by her jointly with such other person or persons as aforesaid, as the case may be, without the concurrence of her husband

These sections extend the Act of 1870 by including shares, &c, in which liability to further payment is incident, by not restricting the powers to sums not less than 20*l*, and by extending the powers of investment to deposits in any banks (not savings banks only), annuities granted by any person (not government annuities only), and to shares, &c, in any corporation or public body, municipal or otherwise.

By sect. 10 it is further enacted that—

Fraudulent
investments
with money
of husband

“If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under sect. 17 of this Act (*p*), order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband, and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors, but any moneys so deposited or invested may be followed as if this Act had not passed.”

Moneys pay-
able under
policy of
assurance not
to form part
of estate of
the insured

By sect 11, it is provided that a married woman may effect a policy upon her own life or the life of her husband for her separate use, and the same and all benefit thereof shall enure accordingly; and this section further enacts that—

A policy of insurance effected by a married man or woman on his or her own life, and expressed upon the face of it to be for the benefit of the other of them with or without the children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts, provided, that if it shall be proved that the policy was effected or the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid.

(*p*) *I e*, summary application

Sect 18 "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*."
 CHAPTER XX
Married woman as an executrix or trustee

As to mortgages of settled lands of which a married woman is tenant for life, see Chapter XXII (g).
 Settled Land Acts.

x.—Restraint on Anticipation.—A restraint on alienation or anticipation of income given to a married woman is inoperative, unless the income is given to her for her separate use or is her separate property by statute, and a gift to her separate use will not be implied from the mere fact that this is restrained from anticipation (r).
 No restraint on anticipation where no separate use

The clause against anticipation prevents any mortgage or charge by a married woman (s); but arrears, after they have fallen due, may, notwithstanding the clause against anticipation, be assigned or charged by her (t), and have been held to be liable under a sequestration for costs directed to be paid by her (u), and it is now settled that such arrears are available in execution upon a judgment against the married woman, whether accrued due before or after the date of the judgment (x).
 Effect of restraint

A Court of equity will give effect during coverture to a clause in restraint of alienation annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, and whether it be in fee or absolute, or only for life (y). With regard to personal estate, it was formerly considered that a clause restraining anticipation on an absolute gift
 To what property restraint attaches

(g) *Post*, p 392
 (i) *Baggett v Mew*, 1 Ph 627, *Stogdon v Lee*, (1891) 1 Q B 661. As to what expressions will amount to a restriction on anticipation, see *Hannett v M'Dougall*, 8 Beav 187, *Moore v Moore*, 1 Coll 54, *Medley v Honton*, 14 Sim 222, *Harrop v Howard*, 3 Ha 624, *Baker v Bradley*, 7 De G M & G 597.
 (s) *Re Farson's Trusts*, 31 Ch D 275, at p 280.
 (t) *Harman v. Richards*, 10 Ha 81,

Re Btelle, Brattle v Burdett, 2 De G. J & S 79
 (u) *Claydon v Finch*, L R 15 Eq 266, *Hyde v Hyde*, 15 P D 166, C A
 (x) *Hood-Barrs v Hervot*, (1896) A C 174, reversing the decision of C A, (1895) 2 Q B 212, and overruling on this point *Hood-Barrs v Cathcart*, (1894) 2 Q B 559, C A.
 (y) *Baggett v Mew*, 1 Ph 627, *Re Gaskell's Trusts*, 11 Jur N S 780, *Re Ellis' Trusts*, L R 17 Eq 409

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the married woman alone, or by her jointly with such other person or persons as aforesaid, as the case may be, without the concurrence of her husband

These sections extend the Act of 1870 by including shares, &c, in which liability to further payment is incident, by not restricting the powers to sums not less than 20*l*, and by extending the powers of investment to deposits in any banks (not savings banks only), annuities granted by any person (not government annuities only), and to shares, &c, in any corporation or public body, municipal or otherwise

By sect. 10 it is further enacted that—

Fraudulent
investments
with money
of husband

“If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under sect. 17 of this Act (*p*), order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband, and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors, but any moneys so deposited or invested may be followed as if this Act had not passed”

Moneys payable under policy of assurance not to form part of estate of the insured

By sect. 11, it is provided that a married woman may effect a policy upon her own life or the life of her husband for her separate use, and the same and all benefit thereof shall enure accordingly; and this section further enacts that—

A policy of insurance effected by a married man or woman on his or her own life, and expressed upon the face of it to be for the benefit of the other of them with or without the children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts; provided, that if it shall be proved that the policy was effected or the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid

Sect 18 "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*"

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Married woman as an executrix or trustee

As to mortgages of settled lands of which a married woman is tenant for life, see Chapter XXII. (g)

Settled Land Acts.

X.—**Restraint on Anticipation.**—A restraint on alienation or anticipation of income given to a married woman is inoperative, unless the income is given to her for her separate use or is her separate property by statute, and a gift to her separate use will not be implied from the mere fact that this is restrained from anticipation (r).

No restraint on anticipation where no separate use

The clause against anticipation prevents any mortgage or charge by a married woman (s), but arrears, after they have fallen due, may, notwithstanding the clause against anticipation, be assigned or charged by her (t), and have been held to be liable under a sequestration for costs directed to be paid by her (u), and it is now settled that such arrears are available in execution upon a judgment against the married woman, whether accrued due before or after the date of the judgment (x).

Effect of restraint

A Court of equity will give effect during coverture to a clause in restraint of alienation annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, and whether it be in fee or absolute, or only for life (y). With regard to personal estate, it was formerly considered that a clause restraining anticipation on an absolute gift

To what property restraint attaches

(g) *Post*, p 392

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(s) *Re Vandon's Trusts*, 31 Ch D. 275, at p 280

(t) *Harman v. Richards*, 10 Ha 81,

Re Brette, Brette v Burdett, 2 De G J. & S 79

(u) *Claydon v Finch*, L R 15 Eq 266, *Hyde v Hyde*, 15 P D 166, C A

(x) *Hood-Barrs v Hervot*, (1896) A C 174, reversing the decision of C A, (1895) 2 Q B 212, and overruling on this point *Hood-Barrs v Cathcart*, (1894) 2 Q B 559, C A

(y) *Baggett v Meux*, 1 Ph 627, *Re Gaskell's Trusts*, 11 Jur N S 780, *Re Ellis' Trusts*, L R 17 Eq 409.

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of a fund, not producing income, is ineffectual to prevent the married woman from dealing with it, but it appears to be now settled that there is no distinction between alienation and anticipation, and that the restraining clause is effectual whether the fund produces income or not, as it is the duty of the trustees or the Court to invest it (z).

Where a fund, subject to a particular estate, is given absolutely to a married woman with a restraint on anticipation, the restraint will not, unless such intention appears, be confined to the continuance of that particular estate (a).

Fraud

The clause against anticipation is such a protection against the acts of the wife that its effect is not nullified even by her fraud (b).

Power of appointment

Where a limited power of appointment is given to a married woman, and a clause against anticipation is attached to the power, and, in default of appointment, the estate is limited to her separate use generally, she may dispose of the estate without regard to the power (c).

Rule against perpetuities

Where the clause against anticipation is obnoxious to the rule against perpetuities (d), the limitation to the separate use is good, and the clause against anticipation is void; and the married woman can mortgage or otherwise deal with the property as if no such clause existed (e). Where the limitation is to a class of daughters, some of whom are in existence at the date of the settlement or the death of the testator, the clause is valid as to them, though void as to those unborn (f).

Exercise of powers under Settled Land Acts.

The restraint does not prevent the exercise of the powers conferred by the Settled Land Act, 1882, upon a tenant for life who is a married woman (g). But a restraint on anticipation attached to an estate in fee simple does not constitute a married woman a tenant for life within the meaning of the Act, or

(z) *Re Boun, O'Halloran v King*, 27 Ch. D 411, *Re Grey's Settlement, Aca-son v Greenwood*, 34 Ch D 712, C A. See *Gibson v Way*, 32 Ch D 361.

(a) *Re Tippet's and Neubould's Contract*, 37 Ch D 444, C A.

(b) *Jackson v Hobhouse*, 2 Mer 483. *Olve v Carew*, 1 J & H 199, *Arnold v. Woodhams*, L R 16 Eq 29, *Stanley v. Stanley*, 7 Ch D 589. See *Re Glanville, Ellis v. Johnson*, 31 Ch D 532, at p 537.

(c) *Barrymore v. Ellis*, 8 Sim 1, *Brown v Bamford*, 1 Ph 626, *Faughan v. Vanderstegen*, 2 Drew. 188.

(d) See as to this, *Re Ridley, Buckton v Hay*, 11 Ch D 645.

(e) *Fry v Capper, Kay*, 163, *Re Teague's Settlement*, L R 10 Eq 564, *Re Cunningham's Settlement*, L R 11 Eq 324, *Re Ridley, Buckton v. Hay*, 11 Ch D 645. And see *Thornton v Bright*, 2 My & Cr 230, *Re Errington, Bawtree v Errington*, W N (1887) 23.

(f) *Herbert v Webster*, -15 Ch D. 610, *Cooper v Laroche*, 17 Ch D. 368.

(g) 45 & 46 Vict c 38, s 61 (6)

enable her to exercise the statutory powers of a tenant for life (*h*) CHAPTER XX

By the Conveyancing Act, 1881, the Court is empowered, with the consent of the married woman, to bind her interest by way of mortgage, or otherwise, notwithstanding a clause against anticipation (*i*), if it is clearly for her benefit (*h*), as where she is harassed by debts (*l*), and living separate from her husband (*m*) Removal of restraint

Restraint on anticipation was removed so as to enable the income of a fund to which a wife was entitled for life to be applied in keeping down interest on a mortgage effected jointly by her and her husband, and in paying premiums on policies on his life forming part of the security, on the mortgagees undertaking to reduce the rate of interest, and not to call in the principal without the leave of the Court (*n*) But the Act does not enable the Court to remove the restraint for the purpose of paying debts which are those of the husband alone (*o*) See, generally, as to the considerations which may influence the Court in the exercise of its power to remove the restraint, the cases cited in the note (*p*)

The consent of the woman should generally be obtained by separate examination (*q*)

The Married Women's Property Act, 1882 (*r*), makes no alteration in the law as to the validity and effect of restraints on anticipation A married woman now, as before the Act, can only dispose of, or contract in relation to, her separate property which she is not restrained from anticipating. Restraint not affected by Married Women's Property Act, 1882

By sect 19 of that Act, it is enacted that.—

“Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to any such settlement” Saving of existing settlements and the power to make future settlements

(*h*) *Bates v Kesterton*, (1896) 1 Ch 159

(*i*) 44 & 45 Vict c 41, s 39

(*h*) *Tamplin v Miller*, W N (1882) 44, *Warren's Settlement*, W N (1883) 125, O A, *Re Little's Will*, 36 Ch D 701, C A

(*l*) *Hodges v Hodges*, 20 Ch D 749, Fry, J, *Re C's Settlement*, 56 L T 299

(*m*) *Exp Thompson*, W N (1884) 28

(*n*) *Re Milner's Settlement*, (1891) 3 Ch 547.

(*o*) *Re S's Settlement*, W N (1893) 127

(*p*) *Re Jordan*, W N (1886) 6, *Re Currey*, W N (1887) 28, *Re Segrave's Trusts*, 17 L R Ir 373, *Re Tippet and Newbould's Contract*, 37 Ch D 444, C A, *Re Little*, 40 Ch D 418, O A, *Re Tennant's Estate*, 25 L R Ir 522

(*q*) *Hodges v Hodges*, 20 Ch D 749, *Musgrave v Sandeman*, 43 L T 215 See *Harris v Harford*, W N (1888) 190.

(*r*) 45 & 46 Vict c 75.

CHAPTER XX

after attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument, but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

Where by an existing settlement all future property of the wife to a specified amount (except interest settled to her separate use) was included, and after the Act of 1882 the wife became entitled to an absolute interest above the specified amount, which she claimed to be paid to her on her separate receipt under sect 5, it was held that by sect. 19 the settlement was exempted from sect. 5, and the absolute interest was subject to the settlement (s).

Where a judgment had been recovered against a married woman who subsequently obtained a dissolution of her marriage and married again, and on such second marriage settled her property to her separate use without power of anticipation, it was held that, the debt having been contracted before the second marriage within sect 19, the restraint on anticipation was void as against it (t).

By the Married Women's Property Act, 1893 (u), s. 2, it is enacted that :—

Costs may be ordered to be paid out of property subject to restraint on anticipation

"In any action or proceeding now or hereafter to be instituted by a woman, or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction, by judgment or order from time to time, to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and a sale of the property or otherwise, as may be just."

It is conceived that the words "or otherwise" empower the Court in a proper case to direct the costs to be raised by mortgage of property which a married woman is restrained from anticipating. It is to be observed that this section does not give

(s) *Re Stonor's Trusts*, 24 Ch. D 195; *Re Whitaker, Christian v Whitaker*, 34 Ch. D 227, *Hancock v Hancock*, 38 Ch. D 78.

(t) *Jay v Robinson*, 25 Q. B. D 467, C. A.
(u) 56 & 57 Vict. c. 63

the Court jurisdiction to order the costs of an action or proceeding instituted against a married woman to be raised and paid notwithstanding the restraint (*x*)

xi.—Liability of Married Women under Covenants for Payment of Mortgage Moneys.—The former doctrine, as to the liability of the separate estate of a married woman to her engagements, was, that she must show an intention, either express or by implication, to create a charge; and for this purpose a bond, or promissory note, or other general security in writing, was considered necessary; such writing could have no operation, except as against her separate estate (*y*) So in *Murray v Barlee* (*z*), it was held that a written retainer by a married woman of her solicitor, or a written acknowledgment or adoption of his professional conduct, or instructions in writing to proceed, were sufficient to create an implied promise to pay all proper expenses incurred on her behalf, and thereby to charge her separate estate, although, in that case, there was a written promise to pay. But, according to more recent cases, such property is liable to her general engagements, though no written instrument is executed; not by way of execution of any power, as was once held (*a*), but upon the ground that, having a power to deal with the property, she has the other powers incident to property in general, viz, the power of contracting debts to be paid out of it, and, inasmuch as her creditors had not the means at law of compelling payment of those debts, a Court of equity took upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate estate as the only means by which they might be satisfied (*b*)

Contracts
by married
women under
the old law

Thus, independently of the statutory enactments to be presently considered, the separate estates of married women are bound by their debts, obligations, and engagements, contracted with reference to and upon faith or reference to those estates, and a married woman may render her separate property liable to a charge without having in the transaction made any direct charge on, or made any reference to, the property settled to her separate

(*x*) *Hood-Barrs v Cathcart*, (1894) 3 Ch 376, C A., *Hollington v Dean*, W N (1895) 35 For form of order, see *Davies v Treharris Brewery Co*, W N (1884) 198

(*y*) *Hulme v Tenant*, 1 Bro C C 16, *Stuart v Lord Kilkwall*, 3 Madd 387, *Greatley v. Noble*, 3 Madd 79,

Bullpin v Clarke, 17 Ves 365

(*z*) 3 My & K 209, 225 See *Bolden v Nicholay*, 3 Jur N S 884

(*a*) *Field v Soule*, 4 Russ 112

(*b*) See *Owens v Dickenson*, Cr & Ph 53, 54; *Murray v Barlee*, 2 My & K 220.

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use (c). The Court will readily assume, in the absence of contrary intention, that the contract was entered into upon the faith of the separate estate, so as to create a valid charge thereon.

Thus, the separate estate and savings therefrom, and investments from savings, are bound by her contract in taking shares in a company (d), and are liable for the rent of a house occupied by her, when living separate from her husband (e).

When a married woman, having separate estate, and living apart from her husband, contracts debts, the Court will impute to her the intention of dealing with such separate estate (f).

Operation of
covenant for
payment by
married
woman

If a mortgage deed contains a covenant by a married woman for payment of principal and interest, such covenant will not, strictly speaking, operate as such, so as to bind her personally, "her person cannot be made liable, either at law or in equity; but, in equity, her property may" (g); and the Married Women's Property Act, 1882, does not appear to make any change in the law in this respect. The covenant will, however, operate as a contract binding upon her general separate estate, inasmuch as, according to what is now the settled doctrine of the Court, the separate estates of married women are bound by their debts, obligations, and engagements contracted with reference to, and upon the faith or credit of, those estates (h). Before the Married Women's Property Act, 1882 (i), a married woman could only bind property to which she was entitled for her separate use, free from restraint on anticipation, at the time of entering into the covenant or contract (l).

Charging
devise.

A mortgagee seeking to enforce his remedy against the general separate estate of a married woman under her covenant or contract for payment, irrespective of his remedy against the particular fund specifically charged, must get a decree charging the general separate estate (l).

(c) *Per* Lord Langdale in *Crosby v Church*, 3 Beav 485, at p 489. See also *Smith v Smith*, 9 Beav 80, *Skinner v Todd*, W N (1881) 166.

(d) *Re Leeds Banking Co*, L R 3 Eq 781, *Butler v Cumpston*, L R 7 Eq 16.

(e) *Gaston v Frankum*, 16 Jur 507.

(f) *Johnson v Gallagher*, 3 De G F & J 494, *MacHenry v Davies*, L R 6 Eq 462, *S C*, L R 10 Eq 88, *Picard v Hine*, L R 5 Ch A 274, *Hodgson v Williamson*, 15 Ch D 87.

(g) *Per* Turner, L J, in *Johnson v Gallagher*, 3 De G F & J. 494, at

p 519. See also *Hulme v Tenant*, 1 Bro C C 15, at p 21, *Aylett v Ashton*, 1 My & Cr 105.

(h) *Johnson v Gallagher, sup*, *MacHenry v Davies*, L R 6 Eq 462, L R 10 Eq 88, *Picard v Hine*, L R 5 Ch A 274, *Hodgson v Williamson*, 15 Ch D 87.

(i) 45 & 46 Vict c 75, s 4. See *infra*.

(l) *Pike v Fitzgibbon*, 17 Ch D 454, C A.

(j) *Johnson v Gallagher*, 3 De G F & J 494, *MacHenry v Davies*, L R 6 Eq 462.

The costs of the suit will fall upon the separate estate (*m*), unless there is a clause against anticipation (*n*)

CHAPTER XX
Costs

Where proceedings are already pending, an order against the separate estate can be made without further suit (*o*)

The form of the order is to charge generally all the property vested in the married woman, or any trustee for her, with the debt and costs (*p*), with an inquiry of what the separate property which she is not restrained from anticipating (*q*) consists, and in whom it is vested; and when the property is ascertained, a further order is obtained, charging the specific property with the debt and interest at 4 per cent and costs, without prejudice to any claim by the trustee (*r*), and the trustee is not a necessary party (*r*).

Form of
order

An injunction will not be granted against the trustees parting with the fund pending the trial of the action, in the case of a general engagement (*s*).

In all cases where the separate estate of a married woman is sought to be charged, independently of statute (*t*), the husband is a necessary party, but no personal judgment can be obtained against either the husband or the wife (*u*) The only judgment is against the separate estate, and if a clause against anticipation is attached, there can be no judgment (*x*)

The Married Women's Property Act, 1882, enacts as follows as regards the power of a married woman to bind her separate property by covenant or contract entered into on or after the 1st of January, 1883, and the extent of her liabilities thereunder —

Contracts
by married
women under
the present
law

Section 1 “(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her, and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her

(*m*) *MacHenry v Davies*, L R 10 Eq 88, 94, *Morrell v Cowan*, 6 Ch D 166, 172

(*n*) *Moore v Moore*, 1 Coll 54 As to orders for payment of costs notwithstanding the restraint, see *ante*, p 342

(*o*) *Re Peace*, 24 Ch D 405, C A

(*p*) *Davies v Jenkins*, 6 Ch D 728, *Collett v Dickenson*, 11 Ch D 687, S C, 4 Ex D 285

(*q*) *Bursell v Tanner*, 13 Q B D 691

(*r*) *Collett v Dickenson*, 11 Ch D 687, S C, 4 Ex D 285, *Re Peace*, 24 Ch D 405, C A

(*s*) *Robinson v Pickering*, 16 Ch D 660, C A

(*t*) *Infra*.

(*u*) *Collett v Dickenson*, *sup*, *Hancock v Demerco-Lablache*, 3 C P D 197

(*x*) *Pike v Fitzgibbon*, 17 Ch D 454, C A, *Perks v Mylrea*, W N (1884) 64

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in any such action or proceeding shall be payable out of her separate property, and not otherwise

“(3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown

“(4) Every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire” (y)

Remedies
of married
woman for
protection
and security
of separate
property

By sect 12, every woman, whether married before or after the Act, is to have in her own name against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property as if such property belonged to her as a *feme sole*.

Thus leave of the Court is no longer necessary to enable her to sue without a next friend or without giving security for costs (z), and it makes no difference whether or not the cause of action arose before the Act (a).

It was held that, under sub-sects. (3) and (4), in order to render a married woman capable of binding herself by contract in respect of her separate property, it must be shown, as before the Act (b), that she had some separate property at the time when the contract was made (c).

Repeal of s 1
(3) and (4) of
Act of 1882

These sub-sections are now repealed by the Married Women's Property Act, 1893 (d), which came into operation on the 5th December, 1893, by sect 1 of which it is enacted as follows.—

Effect of
contracts by
married
women

“Every contract hereafter entered into by a married woman otherwise than as an agent,

- (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such a contract,
- (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to, and
- (c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to;

Provided that nothing in this section contained shall render avail-

(y) This renders obsolete the rule laid down in *Pike v Fitzgibbon*, 17 Ch D 454, C A. See *Cox v Bennett*, (1891) 1 Ch 617, 622

(z) *Threlfall v Wilson*, 8 P D 18

(a) *Sovereign v. Civil Service Association*, 48 L T. 485.

(b) *Johnson v Gallagher*, 3 De G F & J 494, *Pike v Fitzgibbon*, 17 Ch. D 454, C A

(c) *Re Shakespear, Deakin v Lakin*, 30 Ch D 169, *Falser v Gurney*, 19 Q B D 519, *Stogdon v Lee*, (1891) 1 Q B 661

(d) 56 & 57 Vict c. 63, s 4

able to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating ”

CHAPTER XX

As under sect 1 (2) of the Married Women's Property Act, 1882, a married woman may be sued as if she were a *feme sole*, it will be no longer necessary, as hitherto (e), to join the husband as defendant, unless the plaintiff seeks to establish his claim either wholly or in part against both of them (f), and in case of such unnecessary joinder, the plaintiff will be liable to pay the husband's costs (f).

Joinder of husband in action against wife generally unnecessary

By Ord XVII. r. 2, it is provided that, in the case of the marriage of any party to a cause or matter, the Court or judge may, if it be deemed necessary for the complete settlement of all the questions involved, order that the husband be made a party, or be served with notice, on such terms as the Court or judge shall think just (g)

Court may order husband to be made a party

By Ord. XVIII r. 4, claims by and against a husband and wife may be joined with claims by or against either of them separately.

Joinder of claims

By sect. 18 of the Act of 1882, a married woman who is an executrix or administratrix, alone or jointly with any other person or persons, of the estate of any deceased person, or a trustee alone or jointly, as aforesaid, of property subject to any trust, may sue or be sued without her husband as if she were a *feme sole*.

Married woman as an executrix or trustee

Sect. 23 enacts that —

“For the purposes of this Act the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living ”

Legal representative of married woman

By sect 13 of the Act it is enacted as follows:—

“A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage (h), including any sum for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relat-

Wife's ante-nuptial debts and liabilities

(e) *Hancocks v. Demerco-Lablache*, 3 C P D 197

(f) Sect 15 As to the meaning of “joint judgment” in this section, see *Beck v. Pierce*, 23 Q B D 316, 321, C A

(g) See *Stanhope v. Stanhope*, 11 P

D. 103

(h) As to what ante-nuptial debts are within this and the following sections, see *Re Hedgeley*, *Small v. Hedgeley*, 34 Ch D 379, *Beck v. Pierce*, 23 Q B D 316, C A, *Jay v. Robinson*, 25 Q B D 467, C A.

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ing to joint stock companies, and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong, and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property, and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof. Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed, or otherwise, if this Act had not passed."

General
power of ap-
pointment

With respect to separate use to which a general power is added, if property is settled upon a married woman, for her separate use for her life, with power to dispose of it by deed or will, and in default over to a stranger, the Court has never gone further than to affect the limited interest during her lifetime (*i*); but after her death, the *corpus* is subject, as separate property, to her general engagements, whether the power be exercised or not (*h*). *à fortiori*, where, in default of appointment, the limitation is to her executors and administrators (*l*), in which case, the property would be, to all intents and purposes, separate property in her lifetime (*m*).

Power exer-
ciseable by
will

Where the power is exerciseable by will only, and there is a limitation in default of appointment, and the power is not exercised, of course the general engagements of the married woman cannot prevail against the parties entitled in default of appointment (*n*). But if the power is exercised, but not for creditors, the better opinion would seem to be, that the appointed property becomes assets for the payment of the married woman's engagements, to the same extent as the assets of any other person not under the disability of coverture would, under the circumstances, be bound (*o*). Where a married woman with a general

(*i*) *Hulme v. Tennant*, 1 Bro C C 15, *Field v. Soule*, 4 Russ 112

(*h*) *Heatley v. Thomas*, 15 Ves 596, *Robinson v. Durgate*, 2 Vern 181, *Mayd v. Field*, 3 Ch D 587. But see *Hansen v. Miller*, 14 Sim 27

(*l*) *London Chartered Bank of Australia v. Lemprière*, L R 4 P C 572, dissenting from *Shattock v. Shattock*,

2 Eq 182

(*m*) *London Chartered Bank of Australia v. Lemprière*, *sup*

(*n*) See *Paul v. Paul*, 20 Ch D 742, C A

(*o*) *Nail v. Punter*, 5 Sim 555, 562, *Williams v. Lomas*, 16 Beav 1. See as to the general liability, *Jenney v. Andrews*, 6 Madd 264.

power exerciseable by will appoints, and the appointee dies in her lifetime, whether a gift over in default of appointment takes effect or not depends on her intention to make the property her own, as, for instance, by a charge of debts (*p*). It has been contended that the exercise by a married woman of a power of appointment by will does not make the property applicable to the payment of her engagements, as charges on her separate estate (*q*), but the decision in *Vaughan v Vanderstegen* (*q*), that the fraud of the married woman created such an equitable demand as to be enforceable against the appointed property in preference to voluntary appointees, would seem to create such a technical distinction from other debts and the general engagements of the married woman as ought to be disregarded (*r*). The law is settled now against the view of Sir R. Kindersley, V.-C (*s*)

The Married Women's Property, Act, 1882, enacts—

Sect 4 "The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act" (*t*)

Execution of
general
powers

The liability will attach though she had no separate estate at the time when she contracted the debts (*u*).

The husband, paying off a debt charged on the separate estate, stands in place of the mortgagee, as against the estate of the wife (*x*).

A married woman was not liable to the bankrupt law, even though she had separate estate and had contracted engagements after her marriage. But the law in this respect is now altered as regards married women carrying on trades separately from their husbands (*y*).

Debts payable out of funds held in trust for separate use are not barred by the Statute of Limitations (*z*)

(*p*) See *De Luss's Trusts*, 3 L R Ir 232, *Pinde's Settlement*, 12 Ch D 667, 672, *Jessel, M R*, disapproving *Hoare v Osborne*, 33 L J Ch 586, *Willoughby Osborne v Holyoake*, 22 Ch D 238

(*q*) *Vaughan v Vanderstegen*, 2 Drew 165, 184, 191, *Hobday v. Peters*, 28 Beav 603, *Shattock v Shattock*, L R 2 Eq 182

(*r*) *London Chartered Bank of Australia v Lemprière*, L R 4 P C 572, 596, see *Farwell, Pow* (2nd ed) 262

(*s*) *Re Harvey's Estate*, *Godfrey v*

Harben, 13 Ch D 216, *Hodges v Hodges*, 20 Ch D 749

(*t*) This section applies only to contracts made after the commencement of the Act. *Re Roper, Roper v Doncaster*, 39 Ch D 482

(*u*) *Re Ann, Wilson v Ann*, (1894) 1 Ch 549, and as to contracts made after 5th December, 1893, see *ante*, p 346

(*x*) *Nelson v Booth*, 3 Jur N S 951.

(*y*) 45 & 46 Vict c 75, s 1 (5) See *Re Gardner*, 20 Q B D 249

(*z*) *Norton v Turvil*, 2 P Wms 144,

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Liability of
husband
under former
law

xii.—Liability of Husband for Debts of Wife before Marriage.

—Until the Acts next mentioned came into operation, a husband was liable for the debts of his wife incurred before marriage; and the separate estate of a married woman was only liable to her debts before marriage upon the bankruptcy of her husband (*a*), and it was liable, although the property was settled to her separate use without power of anticipation (*b*); but by the Married Women's Property Act of 1870 (*c*), a husband, married after the 9th of August, 1870 (*d*), was not liable for such debts, beyond the assets by the Act specified and received by him, and the separate property of the wife was liable for them (*d*), notwithstanding a clause against anticipation.

By the Married Women's Property Act, 1870, Amendment Act, 1874 (*e*), the husband and wife were required to be sued jointly for debts of the wife contracted before the marriage (*s* 1), but the husband was only liable to the extent of the assets in the Act specified

The Acts of 1870 and 1874 are, however, repealed (except as to acts done, rights acquired, or liabilities incurred) by the Married Women's Property Act, 1882 (*f*).

An Englishman having married, in England, a lady who had contracted debts before her marriage, in Jersey, where the husband is liable for debts of the wife contracted before marriage, was held not liable beyond assets derived from his wife (*g*)

By sect. 14 of the Married Women's Property Act, 1882 (*h*), it is enacted that—

“A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bond fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable

Husband to
be liable for
his wife's
debts con-
tracted before
marriage to a
certain extent.

Hodgson v Williamson, 15 Ch D. 87,
V.-C. Bacon not following *Faughan v Walker*, 8 Ir Ch R 468

(*a*) *Discoe v Kennedy*, 1 Bro C C 17, n., *Sparkes v Bell*, 8 B & Cr 1, *Loekwood v Satter*, 5 B & Ad 303, *Chubb v Stretch*, L R 9 Eq 555 See *Beck v Pierce*, 23 Q B D 316, 320, C A

(*b*) *Sanger v Sanger*, L R 11 Eq 470, *London and Provincial Bank v.*

Bogle, 7 Ch D 773, *Williams v. Meisier*, 9 Q B D 337, C A

(*c*) 33 & 34 Vict c 93
(*d*) 33 & 34 Vict c 93, s 12, 37 & 38 Vict c 50

(*e*) 37 & 38 Vict c 50
(*f*) 45 & 46 Vict c 75

(*g*) *De Greuchy v Wills*, 4 C P. D. 362

(*h*) 45 & 46 Vict c 75

before her marriage as aforesaid, but he shall not be liable for the same any further or otherwise, and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property. Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act, for or in respect of any such debt or other liability of his wife as aforesaid."

xiii.—Mortgage by Wife to secure Husband's Debt.—A class of cases has arisen in connection with mortgages by husband and wife of the estate of the latter the question in those cases being, whether the estate of the husband was, under the circumstances of each case, bound to indemnify the estate of the wife against the mortgage

On the general principle that where one person mortgages his property to secure an advance made to another person, it is the debt of the latter (*i*), the rule is, that where a husband borrows money on the security of his wife's estate, as the money is under his power, it is presumed to come to his use, so as to entitle the wife, on the husband's death, to exoneration out of his personal and real assets (*j*), except so far as the mortgaged property has been reduced into possession by the husband during the coverture (*k*)

Parol evidence is, however, admissible to rebut the presumption, and to show that the money was, in fact, raised and applied for the wife's benefit (*l*)

If the money be raised for the benefit of the husband, the wife is regarded as a surety for her husband, and she or her heir will be a creditor, in the place of the mortgagee, on the husband's estate to the amount of the debt discharged out of her estate (*m*); and will have preference to all legatees of the husband (*n*), but will apparently be postponed to all his creditors (*o*), who, however, on the other hand, will not, in case the mortgagee resort to the husband's estate, have a right to stand in his place as creditor on the estate of the wife (*p*)

(*i*) *Lec v Rook*, Moseley, 318

(*j*) *Earl of Kinnoul v Money*, 3 Bro C C 212

(*k*) *Tidd v Lister*, 3 De G M & G 857

(*l*) *Robinson v Gee*, 1 Ves 252, *Clinton v Hooper*, 1 Ves Jun 173

(*m*) *Huntington v Huntington*, 2 Vern 437, *Pocock v Lee*, 2 Vern 604, *Tate v Austin*, 1 P Wms 264, *Pasteriche v Powlet*, 2 Atk 384, *Astley v Tanherville*, 3 Bro C. C. 545, *Lacam v.*

Mertins, 1 Ves Sen 312, *Clinton v Hooper*, 1 Ves Jun 173, *Lancaster v Ewors*, 4 Beav 158, *S C*, 10 Beav 154

(*n*) *Tate v Austin*, 1 P Wms 264, *Hudson v Carmichael*, Kay, 613

(*o*) See *Tate v Austin*, *sup*, *Clinton v Hooper*, *sup*. But the dicta to this effect in these cases were disapproved in *Hudson v Carmichael*, *sup*

(*p*) *Robinson v Gee*, 1 Ves Sen 252

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And even a creditor of the wife has been allowed to sue the wife's executors jointly with persons claiming a fund in Court, which had arisen from the husband's estate, and which fund was subject to an equitable demand of the wife's estate, the executors having refused to take proceedings for establishing the demand; and the claim of the creditor was established (*g*)

Where a wife mortgages her separate property by an instrument which also comprises property of the husband mortgaged by him as security for his debt, she is entitled to exoneration out of his estate in priority to his creditors (*r*).

Where property over which a married woman has a power is mortgaged for the husband's debt, he is primarily liable (*s*); but not so when money is raised for the husband by the exercise by husband and wife of a joint power of appointment, as the estate of the wife cannot be said to be charged (*t*)

If money be raised by the husband to pay off debts of his wife incurred *dum sola*, the wife's estate must bear the burden (*u*), and the like, it seems, will be the case if the principal part of the money raised is applied for such purpose, and the residue retained by the husband for his own benefit (*x*), because the mortgage being a single transaction, the Court will suppose the intention of the parties to be uniform, and that such intention was to charge the wife's estate with the whole debt

If the wife, or her heir after the husband's death, promise to relinquish their claim, parol evidence is admissible of such agreement. But it seems that evidence will not be received of a declaration on the part of the wife that the money was intended by her as a *gift* to her husband, contrary to the express language of the deed (*y*)

It was recommended by the Court, in the case last referred to (*y*), that in instances in which it is the wife's intention that the money raised shall be a gift to her husband, the estate should be vested in trustees, upon trust, by sale or mortgage, to raise the sum proposed; and it is there said that supposing a conveyance to be so made, it is manifest the debt could never be the debt of the husband, but a sum of money to which he would have an original right, without any obligation ever to repay

(*g*) *Lancaster v. Elors*, 4 Beav. 158, S. C., 10 Beav. 154

(*r*) *Aguilar v. Aguilar*, 5 Mad. 414

(*s*) *Thomas v. Thomas*, 2 K. & J. 79

(*t*) *Scholefield v. Lockwood*, 4 De G. J. & S. 22.

(*u*) *Lewis v. Nangle*, Amb. 150; *Bagot v. Oughton*, 1 P. Wms. 347; *Earl of Kinnoul v. Money*, 3 Swanst. 208

(*x*) *Lewis v. Nangle*, *sup.*

(*y*) *Clanton v. Hooper*, 1 Ves. Jun. 173.

The claim of the wife will not be waived by her covenant after her husband's death that the estate shall stand charged with the original debt, and also with a further sum advanced to her (s).

The husband will have a right to be indemnified out of the estate of the wife, if on a transfer of a mortgage charged on the wife's estate he enter into a covenant, or give bond for its payment (a); and if the husband reduces the amount and dies, his estate will be entitled to stand in the place of the mortgagee to the amount of principal paid by him (b), but not of interest (c), and if, at the time of mortgaging the wife's estate, the husband make a provision out of his own estate for his wife's benefit, he may, under the circumstances, be considered as a purchaser of the money raised by the mortgage (d).

SECTION III.

MORTGAGES OF PROPERTY OF INFANTS.

i.—Disability of Infancy.—An infant, being generally incapable of binding himself by contract, cannot of himself enter into a contract of mortgage, or create a valid security on his property for mortgage moneys.

Disability of infancy

Although an infant may by the custom of gavelkind convey by feoffment with livery of seisin, yet this must be taken strictly, and extends only to sales for valuable consideration; the liberty of selling was allowed for the convenience of commerce, which in the case of small divided shares was absolutely necessary (e); and accordingly it is clear that the custom does not enable an infant to create or concur in a mortgage of gavelkind lands

Custom of gavelkind

ii.—Power to Mortgage Property of Infants.—Where a suit is instituted in any Court of equity for the payment of debts of a deceased person to which his heir or devisee is liable, and such

Mortgage of infants' lands for payment of ancestor's debts

(s) *Lacum v Mertins*, 1 Ves Sen 312

(a) *Bagot v Oughton*, 1 P Wms 347

(b) *Pitt v Pitt*, T & R 180, entered in register book as *Pitt v Reid*

(c) *Ruscombe v Hare*, 2 Bl. N S 192

(d) *Lewis v Nangle*, Amb 150

(e) *Sandys' Cons Kane* 169, Bac Abr vol iv 7th ed p 49, *Re Mashell and Goldfinch's Contract*, (1895) 2 Ch 525, 528

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heir or devisee is an infant, the Court may direct a mortgage as well as a sale of the estates of such infant heir or devisee. And where any hereditaments are devised in settlement by a person whose estate is liable to the payment of his debts, so as to vest in any person for life or other limited interest, with remainder over, the Court may authorize such sales and mortgages to be made in cases where such tenant for life or other person having a limited interest is an infant.

Devolution
of surplus
moneys

The surplus of money arising from such sale or mortgage is to descend in the same manner as the estates so sold or mortgaged would have done if no such sale or mortgage had been made.

Power of
Court to direct
conveyance of
infants' lands

The Court may direct, and, if necessary, compel such infant to convey the estates to the mortgagee in such manner as the Court thinks proper and directs, and the infant must convey accordingly, and the conveyance is to be valid and effectual to all intents and purposes as if the infant had been of full age at the time of executing the same (*f*).

Mortgage of
infant's pro-
perty for
repairs

The Court has no power, under the enactments above referred to, in an administration action, in which a certain sum is decreed to be raised out of the testator's real estate for payment of debts, to add to the sum required for that purpose a further sum for repairs of the property, although without such repairs the money could not be raised, and a mortgage would be much more beneficial to the infant heir or devisee than a sale (*g*).

The Court, however, has jurisdiction, upon the principle of salvage, to order a mortgage of the lands to which an infant is entitled in possession for repairs; but the jurisdiction is jealously exercised, and only to the extent of such repairs as may be certified to be absolutely necessary (*h*). And the jurisdiction does not extend so as to enable the Court to charge the interest of an infant tenant for life in remainder (*i*).

Mortgage to
raise money
for fines.

The Court has, apparently, no jurisdiction to order a fine payable for admittance to copyholds of a customary heir, who is an infant, to be raised by mortgage of the copyholds (*j*).

Redemption
of land tax

Where the guardian of an infant tenant in tail redeems the land tax, the sum paid is a charge on the inheritance (*k*),

(*f*) See stats 11 Geo IV & 1 Will IV c 47, 2 & 3 Vict c 60

(*g*) *Hill v Maurice*, 1 De G. & S 214

(*h*) *Re Jackson, Jackson v. Talbot*, 21 Ch. D 786. See *Re Hurst, Hurst v Hurst*, 29 L. R. Ir. 219, *Re Montagu's Settlement, Darbushire v Montagu*, 45

W. R. 380

(*i*) *Re De Teussier's Settled Estates, De Teussier v De Teussier*, (1893) 1 Ch 153

(*j*) *Harbroe v. Combs*, 43 L. J. Ch 336

(*k*) *Ware v. Polhill*, 5 De G. & S 455

ough no declaration has been made according to the stat. 38 CHAPTER XX

III. c 60 (l).

he guardian of an infant, who is the registered owner of a Mortgage of
, has no power under the Merchant Shipping Act (m) to sell infant's ship.
mortgage the ship on behalf of the infant (n).

s to mortgages of lands of infants under the Settled Land Settled Land
, see Chap. XXII (o). Acts

s to mortgages and charges for maintenance of infants, see Maintenance.
p. XXIII (p)

' the personal estate of an infant be applied in paying off a Mortgage
tgage debt secured on his real estate, the debt will be kept paid off out
as personal estate (q). of infant's
personality.

i.—Avoidance of Contracts by Infants to repay Loans.—By Contracts by
Infants' Relief Act, 1874 (r), all contracts, whether by infants for
salty or by simple contract, entered into by infants for the repayment of
ymment of money lent or to be lent (other than contracts for loans are void.
ssaries) are absolutely void, and no action can be brought
atification be made of an infant's contract to pay any debt
tracted during infancy

he Betting and Loans (Infants) Act, 1892 (s), provides Penalty on
persons sending to infants circulars, and inciting them to inciting
persons to borrow.
ow money, are to be guilty of misdemeanour And by
5 of the same Act it is enacted as follows:—

If any infant, who has contracted a loan which is void in law, Avoiding
es after he comes of age to pay any money which in whole or contract for
art represents or is agreed to be paid in respect of any such payment of
, and is not a new advance, such agreement, and any instru- loan advanced
t, negotiable or other, given in pursuance of or for carrying during
effect such agreement, or otherwise in relation to the payment infancy
oney representing or in respect of such loan, shall, so far as it
tes to money which represents or is payable in respect of such
, and is not a new advance, be void absolutely as against all
ons whomsoever

For the purposes of this section any interest, commission, or
r payment in respect of such loan shall be deemed to be a part
uch loan."

The effect of the above enactments seems to be that an infant Effect of this
not during infancy mortgage or charge, or agree to mortgage enactment
charge, his property to secure a loan, nor will any such mort-

Ibid, *Bulkeley v Hope*, 1 K &
32

1) 57 & 58 Vict c 60

) *Michael v Fripp*, L. R 7 Eq 95

) *Post*, p. 392.

(p) *Post*, p. 429.

(q) *Scys v. Price*, 9 Mod 217, 221,

Ex p Phillips, 19 Ves 122

(r) 37 & 38 Vict c 62, s 2

(s) 55 & 56 Vict c 4

CHAPTER XX

Fresh mortgage on attaining full age

gage, charge, or agreement to secure a loan made to him during infancy be valid, unless the loan was for the purpose of paying for necessaries, but that a debt for necessaries or a loan made to him during infancy for the purpose of paying for necessaries will be a sufficient consideration to support a mortgage or charge of his property made on attaining full age (*t*)

But where an infant gave a mortgage which was reconveyed to him on his coming of age, and a fresh mortgage was executed by him of the same property to secure a larger amount, it was held that this was not a mere ratification, but that the mortgage was a valid security for the whole amount (*u*).

An infant cannot be adjudicated a bankrupt (*v*).

SECTION IV.

MORTGAGES OF PROPERTY OF LUNATICS.

Jurisdiction to order mortgage of lunatic's property under 43 Geo III. c 75

i.—Jurisdiction to Mortgage Property of Lunatics.—Independently of statutory enactment, neither the committee of a lunatic nor any other person has power to mortgage or charge the lunatic's property; but such property may now be mortgaged or charged with the sanction of the Lord Chancellor, the Lord Keeper, or the Lords Commissioners for the Custody of the Great Seal, entrusted by the Sovereign's sign manual with the care of the persons and estates of lunatics (*w*). By the statute 43 Geo. III. c. 75, such Chancellor, Keeper, and Commissioners were empowered to direct the freehold and leasehold estates of lunatics so found by inquisition to be charged by way of mortgage or otherwise for payment of the lunatic's debts or the performance of their contracts or engagements, and the costs of such incumbrance; and to direct committees on behalf of the lunatics to convey such property, and procure admittances to and make surrenders of copyholds, and do other necessary acts to effectuate such mortgages or charges.

Lunacy Regulation Act, 1853 ;

This statute was repealed, but its provisions were adopted and amended by the stat. 1 Will. IV. c. 65, which was, in its turn, repealed by the Lunacy Regulation Act, 1853 (*y*). This Act

(*t*) See, as to loans of money for necessaries, *Com Dig tit Infant* (c), 2; *Robert v Knouth*, 2 Esp 472, n.; *Hedgeley v Holt*, 4 C & P 104; *Martin v. Gale*, 4 Ch D 428

(*u*) *Re Foulkes, Foulkes v Hughes*, 69 L. T. 183.

(*v*) *Exp Kibble*, L. R. 10 Ch. A. 373, *Exp. Jones*, 13 Ch. D. 109, C. A., overruling *Exp Lumb*, 2 Ch. D. 227

(*w*) *Foster v Marchant*, 1 Vern. 262. See *Exp Smith*, 5 Ves 556, *Exp Diles*, 8 Ves 79, *Re Halford*, 1 Jur 524, *Exp Birch*, 3 Swanst 98

(*y*) 16 & 17 Vict. c. 70, ss 116—139, amended 25 & 26 Vict. c. 86, ss 13, 16, see Lunacy Regulation (Ireland) Act, 1871, s. 63, and see Lun. Ord. 96, 10 Feb 1883.

provided that the Lord Chancellor might order that any estate or interest of a lunatic in land or stock either in possession, reversion, remainder, contingency, or expectancy, should be sold, or charged and encumbered by way of mortgage, for raising money for the payment of his debts or engagements, the discharge of incumbrances on his estate, and the costs of the commission of lunacy, and the costs of such disposition; the moneys so raised to be applied accordingly in such manner as the Lord Chancellor shall direct; and the Lord Chancellor might direct the committee to execute all necessary conveyances, &c, in the place of the lunatic. The surplus of the moneys so raised by mortgage or charge of land (z), was to be of the same nature and character as the estate from which it has been raised, and the Lord Chancellor was empowered to give orders for the due application of such moneys.

This jurisdiction of the Lord Chancellor was extended to the Lords Justices of Appeal, and other judges entrusted with the care and commitment of the persons and estates of lunatics (a).

The Act of 1853, and its amending Acts, have been repealed by the Lunacy Act, 1890 (b), by sect 117 of which it is enacted as follows.—

Lunacy Act,
1890, s 117

“(1) The judge may order that any property of the lunatic, whether present or future, be sold, charged, mortgaged, dealt with, or disposed of as the judge thinks most expedient for the purpose of raising or securing, or repaying with or without interest, money which is to be or which has been applied to all or any of the purposes following —

Power to
raise money
for certain
purposes

“(a) Payment of the lunatic's debts or engagements

“(b) Discharge of any incumbrance on his property

“(c) Payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit

“(d) Payment of or provision for the expenses of his future maintenance.

“(2) In case of a charge or mortgage being made under this Act for the expenses of future maintenance, the judge may direct the same to be payable, either contingently if the interest charged is a contingent or future one, or upon the happening of the event if the interest is depending on an event which must happen, and either in a gross sum or in annual or other periodical sums, and at such times and in such manner as he thinks expedient.”

The alterations in the law as regards mortgages and charges

Present state
of the law

(z) As to the restriction of this provision to mortgages, &c of land, see *per Giffard, V-C*, in *Jones v Green*, L. R. 6 Eq 555, and *per Chitty, J*,

in *Re Freer*, 22 Ch D at p 627

(a) Judicature Act, 1875 (38 & 39 Vict c 77), s 7

(b) 53 Vict c 5.

CHAPTER XX.

Exercise of jurisdiction

of the property of lunatics introduced by the present Act, and the rules made thereunder, seem to be as follows —

1. The jurisdiction to direct such mortgages and charges to be made is exerciseable by “the judge,” that is to say, the Lord Chancellor for the time being, entrusted by the Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, acting alone or jointly with any one or more of such judges of the Supreme Court as may for the time being be so entrusted, or by any one or more of such judges (*c*)

Extent of jurisdiction.

2. The jurisdiction extends so as to authorize mortgages, &c of any property of a lunatic, that is to say, real or personal property, whether in possession, reversion, remainder, contingency, or expectancy, and any estate or interest, and any undivided share therein (*d*).

Purposes for which jurisdiction may be exercised.

3 A mortgage or charge may be ordered not only, as formerly, for payment of the lunatic’s debts or engagements, or of any incumbrance on his property, but for his past or future maintenance, or otherwise for his benefit.

Procedure.

4. Applications under sect 117 may be made with regard to the property not only of lunatics so found by inquisition, but also of persons not so found, including persons who, through mental infirmity arising from disease or age, are incapable of managing their own affairs (*e*). The application must be made, in the case of a lunatic so found, by his committee (*f*), and, in the case of a person not so found, by a person authorized to make such application by order of the judge (*g*). The application must be by summons at chambers before the masters, unless the judge or the masters otherwise direct (*h*), and the summons should be accompanied by evidence showing that the application is just and reasonable, or otherwise for the benefit of the lunatic (*i*). If the application relates to property of a person of unsound mind not so found, seven clear days’ notice must be given to such person by service of a copy of the summons, indorsed with a notice signed by the applicant or his solicitor (*h*). An affidavit of service must be filed, and the person served may file a notice of objection (*i*). If the master is satisfied, upon

(*c*) See sect 108

(*d*) See sect 341

(*e*) See sect 116 of the Act, and rule 56, and forms 10 and 11 in Sched to Rules of 1892.

(*f*) *Re Townsend*, 2 De G. J. & S. 519.

(*g*) See sect 116 (2).

(*h*) Rules in Lunacy, 1892, r. 19

(*i*) *Re Fox*, 33 Ch D 37

(*k*) Rule 48, and Form 8 in Sched to Rules of 1892.

(*l*) Rules 49 and 50, and Form 9 in Sched.

the evidence, of the propriety of the application, he certifies to the judge accordingly; and on confirmation of the certificate, the master settles and approves a proper mortgage, and the committee, or other authorized person, upon payment to him, or as may be directed, of the amount to be raised, shall, in the name and on behalf of the lunatic, execute the mortgage when so selected and approved, and do all such other acts as are necessary to effectuate the same, and shall, out of the income of the estate of the lunatic or person of unsound mind, pay and keep down the interest on the mortgage (*m*).

In other respects, it would appear that the former law and practice with regard to mortgages and charges of lunatics' estates are unaltered, and that the decisions under the earlier statutes are still in force

Independently of the Married Women's Property Act, 1882 (*n*), the realty or reversionary personalty of a lunatic married woman, not being property settled to her separate use, cannot be effectually conveyed to a mortgagee by her committee, inasmuch as such a conveyance requires to be acknowledged by her personally (*o*). But though the Lunacy Act contains no machinery by means of which a conveyance of the legal estate of a married woman of unsound mind in freehold property can be obtained, the judge has power to make an order binding her beneficial interest in such property, and that of her heir after her death (*p*).

Order where
lunatic is a
married
woman

An order directing a mortgage or charge on the property of a lunatic will not be made unless it is shown to be just and reasonable, and for the lunatic's benefit. Thus the Lord Chancellor refused the application of a lunatic's father, tenant for life of large landed estates, for an order charging the estate of the lunatic tenant in tail in remainder with a sum found by the master to be proper for the lunatic's maintenance, there being no special circumstances nor any evidence that the state of the applicant's family was such as to make the charge just and reasonable (*q*). So, also, if the application is for the purpose of paying the lunatic's debts, the Court will not order a mortgage

Benefit of
lunatic to be
considered

(*m*) Rule 123 See Elmer's Practice in Lunacy, 7th ed 50, Pope's Law and Practice of Lunacy, 2nd ed 186, 187
(*n*) 45 & 46 Vict c 75. See *ante*, p 335.

(*o*) See stats. 3 & 4 Will IV c 74, 20 & 21 Vict. c 57. And see *ante*, pp 318, 324

(*p*) *Re Stables*, 4 De G J & S 257.
(*q*) *Re Pugh*, 3 De G M. & G. 416.

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or charge if it appears that the application is really for the benefit of the creditors, and not of the lunatic, nor unless it is shown that the charge will leave a sufficient maintenance for the lunatic (*r*)

Mortgage of lunatic's estate to pay debts of ancestor

In a recent case, an order was made authorizing the committee of a lunatic co-heiress-at-law to concur with the other co-heiress in raising money to pay the debts of their common ancestor by a mortgage of the entirety of the property derived from him, the Court being of opinion that it was clearly for the benefit of the lunatic's estate that the money should be raised in order to avoid the necessity of a suit for the administration of the estate of the ancestor, it was, however, ordered that the mortgage should be so framed that the lunatic's moiety of the property could not be made liable for any default of the other co-owner in payment of her moiety of the principal and interest (*s*)

Jurisdiction limited to specified purposes

The power of ordering a mortgage or charge under sect 117 of the Act is strictly limited to the purposes specified. So, orders for sale have in several cases been refused, where it has not been shown to the satisfaction of the Court that the money was required for one or other of such purposes (*t*) But the mere fact that the money required might be raised by some other means will not prevent the Court from making the order, if the advantage of the lunatic will be promoted thereby (*u*).

Costs of partition suit

Where a decree in a partition suit, of the estate of a lunatic tenant in tail, directed the costs to be raised out of the estate, but, instead thereof, the land was conveyed to the lunatic tenant in tail, the Lords Justices held that they had no power to authorize the committee to raise the costs by mortgage (*x*); but an indorsement was made on the partition deed of a declaration that the costs were to be a prior charge (*y*)

Costs generally

The costs of proceedings in lunacy are in the discretion of the judge, who may order them to be paid by the lunatic, or out of his estate, or otherwise (*z*).

Mortgage to raise costs

Though the present Act does not expressly mention the payment of costs as one of the purposes for which money may be

(*r*) *Exp Hastings*, 14 Ves 182, *Re Rastion*, 1 Jur 574, *Re Tayler*, 3 Mac & G 427. But see *Exp Hall*, Jac 161. See also *Horne v Fountain*, 23 Q. B D 264, *Re Plenderleith*, (1893) 3 Ch 332, C A, and cases there cited

(*s*) *Re Fox*, 33 Ch. D 37, C A.

(*t*) *Re Vavasour*, 3 Mac & G 275, *Re Corbett*, L R 1 Ch A. 117

(*u*) *Exp Phillips*, 19 Ves 124

(*x*) *Re Bloomer*, 2 De G F & J 154

(*y*) *Ibid*. And see *Singleton v Hopkins*, 1 Jur N. S 1199.

(*z*) 53 Vict. c 5, s 109.

raised by mortgage, it would seem that the Court has jurisdiction to order a mortgage for that purpose as being for the purpose of payment of a debt or expenditure incurred for the lunatic's benefit. It was held, under the earlier Acts, that an order charging the lunatic's real estate could be made after the death of the lunatic, a declaration being inserted in the order that the costs were properly incurred for the lunatic's benefit (*a*).

Where the sole property of a lunatic consisted of a life interest in a fund, over which she had a power of appointing the capital among her children or remoter issue, on the application of her son, who was the only person interested in the fund in default of appointment, to raise money for her maintenance out of the capital of the fund, it was held that the Court could not release the power, but that the order might be made without prejudice to any question which might arise in the event of a valid appointment being subsequently made (*b*).

All the Lunacy Regulation Acts have contained provisions to the effect that the unapplied balance of moneys raised by mortgage, &c, shall retain the character of the property forming the security for the advance; and by sect 123 (1) of the Lunacy Act, 1890 (*c*), it is enacted that—

Lunatic's interest in property not to be altered

“The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage or other disposition under the powers of this Act which may not have been applied under such powers as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged or disposed of.”

Where land of a lunatic is sold compulsorily, as in a partition action, the proceeds are real estate (*d*).

Where a mortgage on the real estate of a lunatic has been paid out of the personalty, the administratrix is entitled to be recouped out of the real estate (*e*).

Mortgage paid off out of personalty.

Where a mortgage on a lunatic's land is paid off, the mortgage is kept alive, without prejudice to the question how the mortgage debt is ultimately to be borne (*f*).

Mortgage kept alive.

(*a*) *Williams v Wentworth*, 5 Beav 325. See *Exp Grimstone*, Amb 706, *Carter v Beard*, 10 Sim 7, *Duncombe v Nelson*, 9 Beav 211, *Re Meares*, 10 Ch D 552, C A.

(*b*) *Re Hurst*, W N (1892) 177,

C A.

(*c*) 53 Vict c 5.

(*d*) *Re Barker*, 17 Ch D 241, C A.

(*e*) *Re Leeming*, 3 De G F & J 43.

(*f*) *Exp Earl Dugby*, 1 J & W

640, *Re Melly*, W N (1883) 121, C A.

CHAPTER XX

Repairs and
improvements

Money of a lunatic laid out in building or re-building on a lunatic's real estate will be taken as a charge for the benefit of the personal estate; but ordinary repairs will be at the expense of the personal estate (*g*).

Improvements and permanent repairs on the estate of a lunatic tenant in tail will not be made out of his personal estate; but the amount required may be ordered to be raised by mortgage or sale of the settled estate (*h*).

Allowances out of surplus income of a lunatic tenant for life have been made to the remainderman in tail, being heir and one of the next of kin, he charging the entail with the sums paid, in favour of the personal estate (*i*).

A committee to whom an allowance is made without account, cannot mortgage the allowance (*l*), but the debts properly incurred by the committee in keeping up the lunatic's establishment will be paid out of the arrears (*l*). So where a committee paid off a charge on the lunatic's real estate, and took an assignment to a trustee for himself, and subsequently paid off the charge out of the surplus rents without any order, he was allowed the amount in passing his accounts (*l*).

By sect. 124 of the Act it is enacted that—

Power to carry
orders into
effect

“The committee of the estate, or such person as the judge approves, shall, in the name and on behalf of the lunatic, execute and do all such assurances and things for giving effect to any order under this Act as the judge directs, and every such assurance and thing shall be valid and effectual, and shall take effect accordingly, subject only to any prior charge to which the property affected thereby at the date of the order is subject.”

Conveyance

In the case of a lunatic mortgagor who was tenant in tail without issue, with the immediate reversion in fee, the land was sold, under 1 Will. IV. c. 65, for payment of his debts, and his committee was ordered to suffer a recovery on his behalf (*m*).

Covenant for
payment of
mortgage
moneys

ii.—Form, Contents, &c. of Mortgage.—It would seem that, where the property of a lunatic is mortgaged to pay his ancestor's debts, the Court has no power to direct or authorize the committee to enter into any covenant on behalf of the lunatic for the payment of principal or interest (*n*).

(*g*) *Re Harris*, Shelford on Lunacy, 2nd ed. p. 276, *Weld v Tew*, Beat 266

(*h*) *Re Gust*, 5 Ch D 881, C A

(*i*) *Re Sparrow*, 20 Ch D 320, C A

(*l*) *Re Weld*, 20 Ch D 451, C A

(*l*) *Newcombe v Newcombe*, Drew 358

(*m*) *Re Brand*, 1 My & K 150

(*n*) *Re Fox*, 33 Ch D 37, C A.

The Court may, however, authorize a committee conveying on behalf of a lunatic, to do so "as beneficial owner," thereby importing into the deed the statutory covenants for title, which, in the case of a lunatic tenant for life, on whose behalf the powers conferred by the Settled Land Acts are being exercised, must be limited by a proviso confining the covenants to the life of the lunatic (o).

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Covenants for title

Where the estate of a lunatic tenant in tail was charged with portions, which were decreed to be raised by sale or mortgage, a disentailing deed was directed, but not further than was requisite for the security, and the mortgage was to be only for a term of years, and without a power of sale (p).

Mortgage for term of years

On a mortgage of two estates of the lunatic under the Lunacy Regulation Act, 1853, a proviso was inserted, declaring that one should be considered the primary security (q).

The usual mode of executing a mortgage on behalf of a lunatic is for the committee to sign the name of the lunatic, "by A B, his committee." But where a lunatic is party to a deed, the execution is valid if the committee signs and seals in his own name (r).

Mode of executing mortgage on behalf of lunatic

iii.—Other Matters—A lunatic may be made a bankrupt with the consent of the Court in Lunacy (s).

Bankruptcy of lunatic

Where it appears to be for the benefit of a lunatic that he should be made bankrupt, the Court will give leave to the committee, in the name of the lunatic, to present a bankruptcy petition under the Bankruptcy Act, 1883, s. 4 (f) (t). But it would seem to be very doubtful whether a lunatic can be adjudicated bankrupt independently of the Court in Lunacy (u); and even assuming such adjudication to be valid, the trustee in bankruptcy taking the lunatic's property, can only do so subject to the jurisdiction in lunacy (x).

The question as to the exercise of the powers conferred on tenants for life by the Settled Land Acts on behalf of lunatics, will be considered in a subsequent chapter (y).

Settled Land Acts

(o) *Re Ray*, (1896) 1 Ch 468, C A.

(p) *Re Pares*, 2 Ch D 61, C A.

(q) *Freeman v Ellis*, 1 H & M. 758.

(r) *Lawrie v Lees*, 7 App Cas. 19.

(s) *Exp Cahen*, 10 Ch D 183, C A.

(t) *Re James*, 12 Q B D 332.

(u) See *Anon*, 13 Ves. 590, *contra*, *Exp. Stamp*, De G 345.

(x) *Re Farnham*, (1895) 2 Ch 799, C A.

(y) *Post*, p. 393.

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SECTION V.

MORTGAGE OF PROPERTY OF BANKRUPT.

The question as to the avoidance of conveyances made in fraud of creditors by persons who are unable to pay their debts will be considered in a subsequent chapter (z).

Bankrupt's
property vests
in trustee

Immediately on a debtor being adjudged bankrupt, all his property belonging to him at the date of the bankruptcy vests in the official receiver until the appointment of a trustee, and then in the trustee (a), whose duty it is, as soon as may be, to take possession of such property, and administer the same for the benefit of the creditors (b).

Power of
trustee to
mortgage

The trustee may, with the permission of the committee of inspection (among other things), mortgage or pledge any part of the property of the bankrupt, for the purpose of raising money for the payment of his debts (c).

Mortgage by
bankrupt of
after-acquired
property

But with regard to property acquired by a bankrupt after his bankruptcy, he is not absolutely precluded from dealing with it. Until the trustee intervenes, all transactions by the bankrupt after his bankruptcy, with any person dealing with him *bonâ fide* and for value, with or without knowledge of the bankruptcy, are valid against the trustee (d).

Real estate

This rule, however, has been held not to apply to real estate, and accordingly does not enable an undischarged bankrupt, even before the intervention of the trustee in bankruptcy, to convey real estate, acquired after the bankruptcy, to a *bonâ fide* purchaser for value so as to give a good title to such purchaser as against the trustee (e).

Leaseholds

But where two leases for ninety-nine years at ground-rents, and subject to the usual lessee's covenants, were granted to an undischarged bankrupt, who demised them by way of mortgage to secure an advance, and the mortgagees sold the property under their power of sale, it was held that, the trustee in bankruptcy not having intervened, the mortgage by the bankrupt

(z) *Post*, Chap XXXI pp 567 *et seq*
(a) Bankruptcy Act, 1883 (46 & 47
Vict c 52), s 54
(b) *Ibid*, s. 50
(c) *Ibid*, s. 57 (5)
(d) *Cohen v. Mitchell*, 25 Q B D

262, 267, this rule does not apply as
between several trustees under succes-
sive bankruptcies *Re Clark, Ex p*
Bearmore, (1894) 2 Q B 393, C A.
(e) *Re New Land Development Assoc*
and Gray, (1892) 2 Ch. 138, C. A.

was valid, and that the purchaser from the mortgagees could be forced to accept the title (f). CHAPTER XX

An undischarged bankrupt may mortgage the contingent surplus of his estate, and the mortgagee may realize the security by sale, provided he sells subject to the rights of the trustee and the creditors under the bankruptcy (g). Contingent
surplus of
bankrupt's
estate

(f) *Re Clayton and Barclay's Contract*, (1895) 2 Ch 212

(g) *Re Evelyn, Exr General Public Works, &c Co*, (1894) 2 Q B 302

CHAPTER XXI.

OF MORTGAGES BY TENANTS IN TAIL.

Effect of
mortgage by
tenant in tail.

i.—Mode of barring Estates Tail in Possession.—Sometimes, from the circumstance of the title deeds being in the custody of a tenant for life in possession who has refused to permit them to be inspected, or from other circumstances, a mortgage security has been taken from a person as tenant in fee, who, on further inquiry, or on subsequent inspection of the title deeds after the estate has fallen into possession, has proved to be tenant in tail only. A tenant in tail has the whole estate in him; and therefore his mortgage by conveyance or demise is in its inception good to the whole extent of the estate tail, and the interest purported to be conveyed or demised is not avoided by the death of the tenant in tail, but it is determinable by entry of the issue, whether the mortgage is by demise for a term of years, or in fee (a).

Bar of entail
by fine or
recovery

An estate tail was formerly barrable by fine or by common recovery, which, if the estate was reversionary, required the concurrence of the freeholder in possession. A fine would bar the heir in tail, but not him that was in remainder or reversion; but a recovery would bar them all (b). A tenant in tail, having barred the estate, could pass to a mortgagee a base fee or the absolute fee simple, according as the bar was qualified or complete.

Bar of entail
under 3 & 4
Will IV.
c 74

By the Fines and Recoveries Act (c), fines and common recoveries were abolished from the 31st December, 1833, and sect 15 of the Act provides that every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, with certain exceptions, may, after that date, dispose of, for an

(a) *Macbell v Clarke*, 2 Ld Raym 778, *Tyrell v Mead*, 3 Burr 1705, *Hankey v Martin*, 49 L T 560

(b) *Shep. Touchst.*, by Preston, 41,

Freem 310

(c) 3 & 4 Will IV c 74, s 2 The corresponding Irish Act is 4 & 5 Will IV c 92

estate in fee simple, or any less estate, the lands (*d*) entailed as against all persons claiming through his estate tail, and also as against all persons whose estates are to take effect after the determination, or in defeasance (*e*), of the estate tail.

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The right of an actual tenant in tail to enlarge his estate to a fee simple cannot be restricted by any attempts on the part of the settlor or testator by inserting clauses, either that he shall not exercise the right, or by purporting to defeat the estate tail in case he exercises the right (*f*).

Right to bar entail cannot be excluded

An "actual" tenant in tail means the tenant of an estate tail which has not been barred (*g*).

Meaning of "actual tenant in tail"

The statutory power of disposition is incapable of exercise by any of the following persons:—(1) women who were at the passing of the Act tenants in tail *ex provisione viri*, under 11 Hen VII c. 20, except with assent (*h*); (2) tenants in tail restrained by Act of Parliament (*i*); (3) tenants in tail after possibility of issue extinct (*k*); and (4) issue inheritable to an estate tail in respect of their expectant interest (*l*).

What entails cannot be barred

By sect. 40 of the Act it is enacted that—

"Every disposition of lands under this Act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail would have made the disposition if his estate were an estate at law in fee simple absolute. Provided nevertheless, that no disposition by a tenant in tail shall be of any force, either at law or in equity, under this Act, unless made or evidenced by deed, and that no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity, under this Act, notwithstanding such disposition shall be made or evidenced by deed."

Tenants in tail to make a disposition as if seised in fee, but not by will or contract

The effect of this proviso is to give statutory confirmation of the established rule, that the issue in tail who claim by paramount title *per formam domi*, are not bound, either at law or in

Effect of this enactment.

(*d*) "Lands" in this Act, unless accompanied by some expression including or denoting copyhold tenure, means freehold land and hereditaments, corporeal and incorporeal. See sect. 1 of the Act.

(*e*) As to the meaning of defeasance in this section, see *Milbank v. Vane*, (1893) 3 Ch 79, C A.

(*f*) *Dawkins v. Lord Penrhyn*, 4

App Cas 51, at p 64

(*g*) 3 & 4 Will IV c 74, s. 1

(*h*) 3 & 4 Will. IV. c 74, s 16

The Act of Hen VII is repealed by sect 17, which is in its turn repealed by the stat 37 & 38 Vict c 35, but without reviving the earlier Act

(*i*) 3 & 4 Wm. IV. c. 74, s 18

(*k*) *Ibid*

(*l*) *Ibid*, s 20

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equity, to carry into effect a covenant or contract by their ancestor to bar the estate tail, or to perfect an incomplete disentailing assurance (*m*). But such a covenant or contract is, independently of the Act, specifically enforceable against the tenant in tail himself, as will be hereafter seen (*n*)

Sect 40 further enacts that—

Married women to make dispositions with husbands' concurrence.

"If the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same, and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as herein-after directed (*o*)."

The concurrence of the husband is necessary though the married woman is entitled for her separate use, but a restraint on anticipation will not prevent her from barring the estate tail with such consent (*p*). The bankruptcy of the husband is no bar to his concurrence (*q*). It is not necessary that the acknowledgment should precede the enrolment of the deed (*r*).

Effect of Married Women's Property Act, 1882

If, however, the woman was married after the year 1882, or if her title to the property comprised in the disposition accrued after 1882 (*s*), a disposition made by her alone, without the concurrence of her husband, and not acknowledged by her, will be effectual to bar the entail (*t*).

Execution of disposition.

A deed of disposition is not liable to be defeated by reason of its not having been executed by the releasee to uses (*u*). But if the disposition is made by way of grant unto and to the use of a person in trust for the grantor in fee, the deed must be executed by the grantee, or it will be liable to be avoided by his subsequent disclaimer (*x*).

Form of disposition.

No particular form of disposition is rendered necessary by the Act, provided that it be made by an assurance which, if made by a tenant in fee, would be sufficient to pass the fee simple absolute (*y*). A disentailing disposition made with a view to giving a mortgagor a charge upon the fee simple may accord-

(*m*) *Fox v Crane*, 2 Vern 305, 306, *All-Gen v. Day*, 1 Ves Sen 218, *Hinton v Hinton*, 2 Ves Sen 631, at p 634. See *Franks v Manuaring*, 2 Beav 116.

(*n*) *Post*, p 377.

(*o*) As to acknowledgments by married women, see sect 79 of the Act. And see *ante*, p 318.

(*p*) *Cooper v Macdonald*, 7 Ch D. 295, C A.

(*q*) *Ibid.* at p 298.

(*r*) *Exp. Tavenor*, 7 De G M & G 627.

(*s*) See the Married Women's Property Act, 1882 (45 & 46 Vict c 75), ss 2, 5.

(*t*) *Re Drummond and Davies' Contract*, (1891) 1 Ch 531.

(*u*) See *Nelson v Agnew*, 1 R. 6 Eq 232.

(*x*) *Peacock v Eastland*, L R 10 Eq 17.

(*y*) *Ibid.* -

ingly, be made either by a separate deed, or by the mortgage deed itself CHAPTER XXI

But a mere declaration of trust is not a sufficient disposition to bar the entail under the Act (z) Declaration of trust

The 21st section provides that the disposition by a tenant in tail under the Act, by way of mortgage, or for any other limited purpose, shall, to the extent of the estate created, be an absolute bar in equity, as well as at law, to all persons as against whom such disposition is by the Act authorized to be made, notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition may be effected, provided, that if the estate created by such disposition shall be only an estate *pur autre vie*, or for years absolute or determinable, or if an interest, charge, lien or incumbrance shall be created, without a term of years absolute or determinable or any greater estate, for securing or raising the same, such disposition shall, in equity, be a bar only so far as may be necessary to give full effect to the mortgage, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary expressed or implied in the deed by which the disposition may be effected Dispositions for limited purposes, as by way of mortgage

The practical effect of this clause appears to be, that in case a tenant in tail creates a charge on the estate, by way of demise for a term of years, or *pur autre vie*, or by way of mere charge without any actual estate, the issue in tail and remainderman will be entitled, subject to the charge or incumbrance so created, notwithstanding any intention declared in the deed to the contrary, as, for example, the insertion of a proviso making the estate redeemable by the mortgagor or *his heirs*. But if a tenant in tail creates any interest by way of mortgage, exceeding his own life estate, and which, in all probability, will be in fee, the issue in tail and remainderman will be bound by it both at law and in equity, although the estate be made redeemable by the mortgagor, or *the heirs of his body*, or other the persons who would have been entitled under the old limitations, in case the same had not been barred; so that in the latter case a new set of limitations by way of re-settlement will be required, unless the sole intent of the instrument be to let in the mortgage Effect of this enactment

(z) *Green v Paterson*, 32 Ch D 95, C A

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Such intent is in every case to be collected from the terms of the particular instrument (a).

If the mortgage is in fee, and it is intended to re-settle the estate to the old uses, the limitations should *not* be introduced into the proviso for redemption, and it would seem that the new settlement should be made by a distinct deed, inasmuch as the Act declares the estate to be barred, notwithstanding any express or implied intention to the contrary in the mortgage deed; but if the mortgage be for a term of years, it is presumed the statute does not prohibit the introduction of further limitations of express uses (b).

Bar of entail
in copyholds.

By sect 50 of the Act entails in legal copyhold estates are made barrable by surrender, and entails in equitable copyhold estates are made barrable by surrender or by deed.

Upon considering sect. 21 in connection with sect 50, in relation to the bar of estates tail in copyholds, it may be thought that, if a legal tenant in tail of copyholds mortgage by conditional surrender, which is not followed by admittance, the estate tail will remain unaffected, if, when the money is paid off, the surrender is vacated by the entry of satisfaction; but that the estate tail would be barred if the surrender were followed by admittance (c).

Application
of the provi-
sions of the
Act to en-
tailed money,
&c.

By sect. 71 it is provided that lands to be sold, of whatever tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this Act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased, would, if purchased, have been actually subject to, and, consequently, they may be disentailed if freehold or leasehold, or of any other tenure except copyhold, or if money, subject to the provisions of the Act relating to the disentailment of freeholds; if copyhold, to those applicable in the case of copyholds.

Where the property disentailed consists of leasehold lands

(a) *Piomley v Felton*, 14 App Cas. 61, P. C., *Re Byron's Settlement*, *Williams v. Mitchell*, (1891) 3 Ch 474.

(b) Sug R P Stats, 2nd ed p. 499
(c) Dav Conv 4th ed Vol. II Pt 11 p 39, n (y).

for years absolute or determinable, or of money, such lands or money shall, as to the person in whose favour or for whose benefit the disposition is made, be treated as personal estate

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Leaseholds or money are to be disposed of by an assignment by deed to be enrolled, except in the case of bankruptcy, when the disposition is to be by the commissioner (trustee), and completed by enrolment in manner directed by the Act in regard to lands not held by copy of court roll.

It has been decided that where money representing land sold, and which is liable under the settlement or statute under which it is sold to be laid out in other lands to be entailed, is in Court, a disentailing deed is necessary before it will be handed over to the tenant in tail (*d*)

Payment out
of Court of
entailed
money

ii.—Bar of Reversionary Estates Tail.—The effect of the enactments above referred to is to enable a tenant in tail in possession of settled lands freely to bar his entail, so as to give to a mortgagee an effectual charge on the fee simple

Disposition
by tenant in
tail in posses-
sion

But, as regards estates tail in remainder or reversion, in order to retain to some extent the check which the old law placed on improvident dispositions by tenants in tail, the statute makes necessary to the validity of a disposition the consent of a "protector" in the place of the concurrence of the freeholder for life in possession, which was formerly essential to a common recovery. Generally speaking, this office is vested, by virtue of the statute, in the person taking beneficially (*e*) the first estate for years determinable on a life or lives or any greater estate (not being an estate for years) prior to the estate tail under the same settlement or will, whether by force of the actual limitations or by resulting use or trust, and an estate by the curtesy is a prior estate within the meaning of this enactment (*f*) When there are several owners of the prior estate, each of them is to be the sole protector as to his undivided share (*g*)

Disposition
by tenant in
tail in re-
mainder re-
quires consent
of protector

Where a married woman is entitled to a prior estate for her separate use she alone is the protector; otherwise, she and her husband together are the protectors.

Married
woman pro-
tector

(*d*) *Re Broadwood's Settled Estates*,
1 Ch D 438, *Re Reynolds*, 3 Ch D

628, C A

(*f*) 3 & 4 Will IV c 74, s 22
(*g*) *Ibid*, s 23 See *Tufnell v Bos-*

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(*e*) *Re Dudson's Contract*, 8 Ch D

ell, L R 20 Eq 194

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Lessees, &c

Power for
settlor to
appoint
protectorLunatic
protector, &cConsent of
protectorMode of
giving con-
sentAs to copy-
holds

Lessees at a rent (*h*), dowresses (*i*), and bare trustees (*l*) (unless taking under a settlement made before the passing of the Act), are excluded from the office of protector

Any settlor may, by the settlement, appoint any number of persons, not exceeding three, to be protectors of the settlement, and may give to any person or persons, not exceeding three, a power of appointing by deed a protector in the place of a protector dying or relinquishing the office (*l*). But no deed of appointment under such a power, or of relinquishment of the office, is to be operative unless enrolled within six calendar months after its execution. In case of death of one or more of several protectors appointed by the settlor or under a power, the survivors or survivor will be the protector (*m*). If they all die, the office will revert to the first owner of a prior life estate (*n*).

In case of the lunacy of a protector, the Lord Chancellor, or other the person or persons entrusted with the care of lunatics (*o*), and in cases of treason or felony, or in cases of infancy, or if it be uncertain whether the protector be living or dead, the Court of Chancery is to be the protector (*p*).

A protector cannot be controlled in the exercise of his discretion as to giving or withholding his consent (*q*). It would seem that a contract under seal by a protector to give his consent would be a sufficient consent under the Act, or might be specifically enforced (*r*). A consent once given is irrevocable (*s*).

The consent may be given by the disentailing assurance itself, or by a distinct deed to be executed either on or at any time before the day on which the assurance is made, otherwise the consent will be void (*t*). And the consent, if given by a distinct deed, is to be considered absolute and unqualified, unless expressly confined by the protector to a particular disentailing assurance (*u*).

In the case of a legal entail of copyholds, if the consent of the protector is given by deed, the deed must be executed by the protector either at or before the time of making the surrender, and produced to the lord of the manor or steward, otherwise the

(*h*) 3 & 4 Will IV c 74, s 26

(*i*) *Ibid*, s 27

(*k*) *Ibid*, s 31

(*l*) *Ibid*, s 32

(*m*) *Bell v Holtby*, L R. 15 Eq

178 (*n*) *Clarke v Chamberlin*, 16 Ch D

178 (*o*) 3 & 4 Will IV. c 74, s. 33

(*p*) See *ibid*, and *Re Wainwright*, 1 Phil 258

(*q*) See *Banhes v Le Despencer*, 11 Sum 527

(*r*) *Banhes v Small*, 36 Ch D 716, at p 724, C A

(*s*) 3 & 4 Will IV c 74, s. 24

(*t*) *Ibid*, s 42

(*u*) *Ibid*, s 43

consent will be void The consent, if not given by deed, must be given by the protector to the person taking the surrender (*x*).

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Where the estate tail in copyholds is equitable, if the protector gives his consent by a distinct deed, the consent will be void unless the deed is executed by the protector either on or at any time before the day on which the deed of disposition is executed by the equitable tenant in tail; and the deed of consent must be entered on the court rolls either at or before the entry of the disentailing deed (*y*).

Equitable estate tail in copyholds

Where there is a protector, his consent to the disposition by the tenant in tail is necessary, whether the settled lands are freeholds or copyholds (*z*); otherwise, a disentailing assurance executed by the tenant in tail, though in all other respects in conformity with the Act, will be inoperative to confer more than a base fee, that is to say, an estate barring the issue in tail, but not those entitled in remainder (*a*)

Disposition without consent of protector creates base fee

iii.—Enlargement of Base Fee—A tenant in tail who has created a base fee, and notwithstanding that he has parted with it, may by deed enlarge that base fee into a fee simple absolute after the death of the protector (*b*), or, during the protectorship, with the protector's consent (*c*); and where the base fee becomes united with the immediate remainder or reversion in fee in the same lands, the base fee instead of being merged into the greater estate will, *ipso facto*, become enlarged (*d*)

Enlargement of base fee by deed

—by union with remainder in fee,

By sect 6 of the Real Property Limitation Act, 1874 (*e*), where a tenant in tail has created a base fee, and any person by virtue of such assurance enters into and continues in possession or receipt of the rents and profits of the land, the remainders will be effectually barred at the end of twelve years from the time when the tenant in tail or his issue could, without the consent of any protector, have barred the remainders under the stat. 3 & 4 Will IV. c 74 Where a conveyance to a purchaser comprised a base fee, and also a prior life estate, it was held that, until the determination of the life estate, time did not begin to run in favour of the purchaser's possession under the conveyance, so as to bar the remainders over (*f*)

—by possession,

And where, for want of the consent of the protector, the dis-

—by sale in bankruptcy.

(x) *Ibid*, s 52(y) *Ibid*, s 61(z) See *ibid*, s 50(a) *Ibid*, s 34(b) *Ibid*, s 38(c) *Ibid*, ss 35, 38.(d) *Ibid*, s 39(e) 37 & 38 Vict c 57 See *Perry v Allen*, 7 De G M & G 426, *Morgan v Morgan*, L R 10 Eq 99(f) *Mills v Capel*, L R 20 Eq 692.

CHAPTER XXI

Conveyance
of fee under
Settled Land
Acts

Security let in
by subsequent
fine or re-
covery

Voidable
estates con-
firmed by
subsequent
disposition

Defective
assurance by
bankrupt
tenant in tail

position by the trustee in bankruptcy under this Act has only the effect of creating a base fee, or the base fee only of the bankrupt is sold under the Bankruptcy Act, such base fee is made *ipso facto* to enlarge into a fee simple upon there ceasing to be a protector (*g*)

A tenant in tail after possibility of issue extinct, and a person entitled to a base fee, can exercise the statutory powers of a tenant for life so as to convey the fee simple of the lands by way of mortgage, for any purpose authorized by the Settled Land Acts (*h*)

If, prior to 3 & 4 Will IV. c 74, a tenant in tail, whether in possession or reversion, made a mortgage security without fine or recovery, and afterwards levied a fine or suffered a common recovery, he let in the assurance, even against a purchaser or mortgagee without notice (*i*).

Where judgment had been obtained and execution had been issued against a tenant in tail in possession, so as in effect, by virtue of the statute 1 & 2 Vict c 110 s 13, to give to the creditor a charge similar to a mortgage of the base fee, the debtor was ordered, in a suit to realize the charge, to execute a disentailing deed, so as to wholly bar the entail and give full effect to the charge created by the judgment (*j*)

In respect of estates voidable through the defective assurance of a tenant in tail, sect 38 of that Act has mainly followed the common law, by enacting that a voidable estate, created in favour of a purchaser (or mortgagee) for a valuable consideration, shall (so far as a subsequent assurance by the tenant in tail can operate under the provisions of the Act) be confirmed by such assurance. But the statute has altered the common law, by introducing an exception in favour of a purchaser for valuable consideration not having express notice of the first assurance, and consequently such purchaser, although he may have notice by *implication* of the defective assurance, yet, if he has not *express* notice, will not be bound by it.

By sect. 62 of the Act it is enacted, that a voidable estate created by a tenant in tail (which term includes the person

(*g*) Sects 60, 61 By the B A. 1883, s 56 (5), the provisions of the 3 & 4 Will IV c 74, on this subject are extended to proceedings in bankruptcy under that Act

(*h*) 45 & 46 Vict c. 38, s 18, 53 & 54 Vict c 69, s 11 And see *Re Morshed's Settled Estates*, W. N (1893)

180. See *post*, p 391

(*i*) *Hunt v Gater*, Poph 5, 6, *Stapilton v Stapilton*, 1 Atk 8, *Tourle v Rand*, 2 Bro C C 650, *Doe v Wichelo*, 8 T R 214, *Lloyd v Lloyd*, 4 Dr & War 354, *Beek v Walsh*, 1 Wils 276

(*j*) *Lewis v Duncombe*, 20 Beav 398

entitled to a base fee, and who would have been actual tenant in tail if the base fee had not been created), becoming bankrupt, in favour of a purchaser for a valuable consideration, shall be confirmed by the disposition of the trustee in bankruptcy (so far as the assurance can operate under the provisions of the Act), unless such disposition shall be made to a purchaser for a valuable consideration without express notice. And by the Act the trustee is directed to convey to purchasers the estates of bankrupt tenants in tail (*l*), and the trustee is authorized *ad interim* to receive rents and enforce covenants (*l*).

And the like effect is given to the disposition by the trustee after the bankrupt's decease, as if he had been alive in the several cases mentioned in the clause, which seem to include all cases except the following where at the time of the bankrupt's decease there is no protector, or where at the time of disposition there is *issue* who would be inheritable under the entail, and there is at the same time either no protector, or a protector consenting or not consenting; or where the bankrupt was tenant in tail entitled to a base fee, and there is at the time of disposition *issue* who would be inheritable under the entail, and a non-consenting protector (*m*). In the last case the base fee would vest in the trustee by force of his appointment, under the Bankruptcy Act, 1883, ss 20 and 21, as it formerly passed under the general bargain and sale

Death of
bankrupt

The bargain and sale of commissioners is now dispensed with as to copyholds, a power of appointment of copyholds being vested in the trustees of the bankrupt's estate (*n*), and as to estates tail, the trustee in bankruptcy has the same powers as the tenant in tail (*o*).

Powers of
trustee

The sects 56 to 73, both inclusive, of 3 & 4 Will IV c 74, are still in force, and were incorporated into the Bankruptcy Acts, 1849 and 1869, and are incorporated into the Bankruptcy Act, 1883, which gives to the trustee in bankruptcy power to deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with it. And it enacts that the sections above referred to shall extend and apply to proceedings in bankruptcy, under the Act of 1883, as if those sections were then re-enacted and made applicable in terms to such proceedings (*o*).

(*l*) 3 & 4 Will IV c 74, ss 56—

(*l*) *Ibid*, s 67

(*m*) *Ibid*, s 65

(*n*) B A 1883, s 50 (4)

(*o*) *Ibid*, s 56 (5)

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Effect of confirmation of defective assurance

In the case of a defective mortgage in 1841 by a tenant in tail in remainder, who, after his bankruptcy and the death of the tenant for life, barred the entail, the confirmation by the commissioners in bankruptcy vested the fee simple in the mortgagee (*p*)

Issue not bound

iv.—Covenants to perfect defective Assurances by Tenants in Tail—It was decided under the old law that if the tenant in tail died before he had performed the necessary acts for barring the entail, the issue claiming *per formam doni* would not be bound to perfect the title of the purchaser or mortgagee (*q*)

It has been seen that the Fines and Recoveries Act (*r*) draws a distinction between dispositions by tenants in tail resting in contract, which are not to be of any force under the Act, and interests actually created under the Act. And by sect 47 of the Act it is enacted that—

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in Courts of law would not be effectual

“In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof, the jurisdiction of Courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this Act to tenants in tail, or of the powers of consent given by this Act to protectors of settlement, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any manner to any act or deed by a tenant in tail or protector of a settlement which in a Court of law would not be an effectual disposition or consent under this Act, and that no disposition of lands under this Act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this Act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this Act in a Court of law”

Power of Court to decree specific performance of covenant to execute disentailing deed.

The effect of the 47th section is, that the Court cannot compel the issue in tail or the remainderman to carry out a contract by a tenant in tail to execute a disentailing assurance, or to remedy any defects in such an assurance (*s*). But there is nothing in

(*p*) *Hankey v Martin*, 49 L T 560

(*q*) *Stapilton v Stapilton*, 1 Atk 8
See also Lit ss 46, 595, 712. And see cases cited *ante*, p. 368, note (*m*)

(*r*) 3 & 4 Will IV c 74, s 15, *ante*, p 366

(*s*) *Banhes v Small*, 36 Ch D 716, C A. See *Mills v Fox*, 37 Ch D. 162

the Act to affect contracts as such, and accordingly, though a covenant for further assurance generally, or even a covenant to execute a disentailing assurance, will not operate to bind the issue in tail or the remainderman under the Act, yet, as against the tenant in tail himself, non-fulfilment of the covenant may support an action for damages, or for specific performance (†)

In such cases the question is whether, upon the construction of the covenant, it was the intention of the parties, expressly or by necessary implication, to bind the tenant in tail to do all in his power to give to his mortgagee an effectual charge on the fee simple. In *Davis v Tollemache* (u), the covenant was for further assurance generally in the usual form, and the Court refused, in a suit for specific performance, to compel the tenant in tail, who had become bankrupt, to exercise the power of disposition reserved to him by sect 64 of the Act by enlarging the estate conveyed by the mortgage. In this case the mortgage was not inrolled, but this point does not appear material, as the covenant, *quâ* contract, did not depend for its meaning or effect upon the provisions of the Act.

Effect of
covenant for
further assur-
ance.

In a recent case, however (x), where a tenant in tail in remainder barred his estate tail without the consent of the protector, and conveyed the base fee so created to a purchaser, covenanting not only for further assurance generally, but also to execute every such disentailing or other assurance as should be reasonably required, the vendor was directed, by way of specific performance of that covenant, to execute a disentailing deed so as to enlarge into a fee simple the base fee which was already vested in the purchaser. It was argued that a covenant for further assurance is only a covenant to further and better assure such estate as is conveyed by the deed which contains the covenant; but Cotton, L J, said that, whether that is so or not, under ordinary circumstances, may be a question, but that here there was an express contract to execute every such disentailing deed as might be necessary in order to vest the premises, *i e*, the property conveyed, in the purchaser, his heirs and assigns.

Express cove-
nant to
execute dis-
entailing
assurance

Where the Court has power to compel the mortgagor tenant in tail to perfect the title, it will not point out what title the

(†) *Bankes v Small*, 36 Ch D 716
See *Petrie v Duncombe*, 7 Ha 24

(u) 2 Jur N S 1181
(x) *Bankes v. Small*, *sup.*

CHAPTER XXI

Rectification
of deedNature of
interest mis-
understoodOf consent
of protector.Dispensation
with enrol-
ment as to
copyholds.

mortgagor shall make; it will decree him to make such title to the mortgagee as he is capable of doing (*y*)

Sect 47 of the Act does not preclude the Court from rectifying the deed of disposition itself, on the ground of mistake or fraud, if it is shown that the instrument as executed and inrolled does not carry out the intention of the parties (*z*)

Similarly, where a disentailing disposition, duly executed and inrolled, sufficiently expressed the intention to convey the fee simple in the entailed property, and clearly passed the interest of all conveying parties, the security was upheld, though the nature of the interests of the conveying parties were misunderstood by them and misrecited in the deed (*a*).

To an action for specific performance of a covenant by a tenant in tail in remainder to disentail the estate after the death of the tenant for life, judgment creditors of the tenant in tail, whose debts have been made charges on his estate under the stat 1 & 2 Vict. c. 110, are not necessary parties (*b*)

v.—Enrolment of Dispositions.—The Act further renders inoperative every assurance of freeholds effected under the Act (except certain leases), though otherwise effectual for disposing of the estate, unless it is inrolled in Chancery (now the Enrolment Department of the Central Office) within six months from the date of execution (*c*)

Every consent of a protector to a disentailing assurance, if given by a distinct deed, is void unless such deed is inrolled in like manner, either at or before the time when the assurance is inrolled (*d*).

In the case of copyholds, where a disposition by a tenant in tail is effected by surrender or by deed, the surrender, or the memorandum thereof, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent, requires no enrolment otherwise than by entry on the court rolls (*e*) A disentailing assurance by a tenant in tail of copyholds, if not entered on the court rolls of the manor within six months after execution, is void (*f*) An indorsement by the steward that the deed was produced to him is not a sufficient

(*y*) *Sutton v Stone*, 2 Atk 100

(*z*) *Hall-Dare v Hall-Dare*, 31 Ch. D 251, C A

(*a*) *Evans v. Jones, Kay*, 29

(*b*) *Petre v. Duncombe*, 7 Ha 24.

(*c*) 8 & 4 Will. IV c 74, s. 41.

(*d*) *Ibid*, s 46

(*e*) *Ibid*, s 54

(*f*) *Honywood v Foster*, 30 Beav 1,
Gibbons v Snape, 1 De G J & S 621,
Green v Paterson, 32 Ch D 95, C A

inrolment (*g*) If the protector consents by deed, such deed must be executed by him and produced to the lord or his steward at or before the time when the surrender is made by which the disposition is effected, or otherwise the consent will be void (*h*) The consent, if not given by deed, must be given by the protector to the person taking the surrender, and provision is made for evidencing the fact of the consent having been given, (1) out of Court, or (2) in Court (*i*)

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A disentailing assurance may be inrolled within six months after execution, notwithstanding the death of the tenant for life who executed it (*h*)

Every inrolled deed operates and takes effect as from the date of its execution, with the exception that every such deed shall be void as against a purchaser for valuable consideration claiming under a deed, although subsequently executed, if such subsequent deed shall be the first inrolled (*l*).

Relation back of inrolled deeds

Sect 59 of the Act contains provisions as to the inrolment of deeds of disposition of freeholds, and entry on court rolls of deeds of disposition of copyholds, and of deeds of consent, in the case of the bankruptcy of tenants in tail.

Inrolment in case of bankruptcy

Having regard to these provisions, it is obvious that it is of the utmost importance to a mortgagee of disentailed lands to see that his security is rendered effectual as against subsequent mortgagees of the same lands by an immediate inrolment of his assurance. Indeed, he ought not to part with his money until the assurance has been enrolled, nor until he has ascertained that up to the time of actual inrolment no other assurance of the mortgaged lands by the tenant in tail has been inrolled. These precautions will prevent the mortgagee's security from being prejudiced by any dealing with the property of which he has not express notice, for none of the provisions in the Act respecting voidable estates have the effect of confirming them against purchasers for value without notice. As the inrolment of a disentailing assurance relates back to its execution, it follows that intermediate conveyances by the persons deriving title under it will have their full effect.

Precautions to be observed by mortgagee as to inrolment.

(*g*) *Boyd v Pawle*, 14 W R 1009

(*h*) 3 & 4 Will IV c 74, s 51

(*i*) *Ibid*, s 52

(*l*) *Re Piers*, 14 Ir Ch R 452

(*l*) 3 & 4 Will IV c 74, s 74

CHAPTER XXII

OF MORTGAGES BY LIMITED OWNERS UNDER POWERS.

SECTION I

OF MORTGAGES UNDER EXPRESS POWERS OF MORTGAGING

Usual form
of powers of
mortgaging

i.—Express Powers of Mortgaging in Settlements and Wills —
The express powers of mortgaging which, before the passing of the Settled Land Act, 1882 (*a*), were not unfrequently inserted in strict settlements of real estate by deed or will were, according to the general practice, given to the trustees of the settlement, not to the tenant for life, but, usually, such powers were made exerciseable by the direction or with the consent of the tenant for life, if of full age, and then only for certain specified purposes, such as providing money for raising portions, renewal of leases, enfranchisement of copyholds, equality of exchange, or paying off incumbrances. Powers of mortgaging are even now sometimes inserted in such settlements, where money is likely to be required for purposes other than those for which tenants for life are by statute empowered to raise money by mortgage of the settled lands (*b*); but the consent of the tenant for life is now necessary to the exercise by the trustees of any such power (*c*).

Power of
leasing, when
includes
power of
mortgaging

If a tenant for life with power to lease for such number of years and upon such terms as he shall “think fit” (*d*), or “think reasonable and proper” (*e*), mortgages by demise for ninety-nine years, at a peppercorn rent, such mortgage is a charge on the inheritance; the lease is not invalid on the ground of a supposed or real hardship on the remainderman, as the power is left to

(*a*) 45 & 46 Vict c 38

(*b*) See *ibid*, s 18, and the Settled Land Act, 1890 (53 & 54 Vict c 69), s 11

(*c*) 45 & 46 Vict c 38, s 18. See as to several tenants for life 47 & 48

Vict c 18, s 6

(*d*) *Sheehy v Lord Muskerry*, 1 H L C 576, *Talbot v Tipper*, Skm 427

(*e*) *Mostyn v Lancaster*, 23 Ch D 583 C A.

the discretion of the tenant for life, who may execute it for his own benefit

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A tenant for life, with power to renew leases for lives on the usual rents and to take fines, may mortgage his interest, including the fines, for his own benefit (*f*).

Mortgage of renewal fines

ii.—Exercise of Power after Alienation.—The power of a tenant for life to sell or mortgage (*g*), or to consent to or direct a sale or mortgage (*h*), expressly limited to him under a settlement, will not, as a rule, be destroyed by the alienation or charging by him of his life interest under the settlement. And it makes no difference whether the alienation of the life interest is by the act of the tenant for life or by operation of law, but in such case the power cannot be exercised except with the consent of the trustee in bankruptcy (*i*).

Exercise of power by tenant for life who has parted with his interest

If, however, it clearly appears from the language of the deed whereby the power is created that it is intended to be exercisable by the tenant for life only so long as he retains possession of his life interest, or, *à fortiori*, if the power contains an express statement to that effect, a charge or alienation by him of his interest under the settlement will destroy the power (*h*).

In *Long v Rankin* (*l*), where the question was, whether a power of leasing in the tenant for life was destroyed by his charging his life interest to secure an annuity, the above proposition was recognized, on the ground that "he who gives the power may give it with what qualifications he pleases."

Where the question is, whether a power to sell or mortgage or to consent to or direct a sale or mortgage is destroyed or not by an alienation by the tenant for life of his life interest, the fact that in such alienation the power was expressly reserved is wholly immaterial (*m*).

Where the tenant for life has parted with his life interest, it does not appear to be necessary, in a subsequent exercise of his power by the tenant for life, that the concurrence of the alienee

Whether concurrence of alienee is necessary

(*f*) *Simpson v. Bathurst*, L R 5 Ch A 193

(*g*) *Jones v Wmwood*, 3 M & W 653, S C, 10 Sim 150

(*h*) *Holdsuorth v Goose*, 29 Beav 111, *Esdell v Hamnesley*, 31 Beav 250, *Walmsley v Butterworth*, 4 L J N S Ch 253, *Warburton v Farn*, 16 Sim 625, *Alexander v Mills*, L R 6 Ch A 124

(*i*) *Re Cooper, Cooper v Slighi*, 27 Ch D 565, *Re Bevingfield and Herring's Contract*, (1893) 2 Ch 332

(*h*) *Haswell v Haswell*, 2 De G F & J 456, *Bullock v Thorne*, 1 Moo 615. And see *Alexander v Mills*, *sup*, at p 133

(*l*) Sug Powers, 8th ed 58, and App at p 895

(*m*) *Alexander v Mills*, *sup*

CHAPTER XXII. of the life interest should be obtained, provided the rights of the alienee are not prejudiced (*n*)

But, upon the principle that a man may not derogate from his own grant, an exercise of a power by a tenant for life, who has parted with or charged his life interest, will be valid only so far as it does not prejudicially affect the estate of the alienee (*o*)

If the exercise of the power would interfere with the rights of the alienee of the life interest, the power is not extinguished, but merely suspended, and may be exercised with the consent and concurrence of the alienee, who may re-convey to the tenant for life or join in the conveyance to the subsequent purchaser or mortgagee (*p*).

SECTION II

OF MORTGAGES BY LIMITED OWNERS, ETC. UNDER STATUTORY POWERS FOR SPECIAL PURPOSES

Statutory powers of mortgage

i.—Generally —Numerous statutes, of which the principal are briefly noticed in the following pages, have been from time to time passed conferring powers of mortgaging settled property on limited owners, and on behalf of persons under disability for specified purposes, these statutes generally contain particular forms of mortgage enforced or recommended by authority of Parliament, but if a statutory mortgage is contemplated, reference must be made to the particular Act in question for the requisite information (*q*).

Liability of mortgagees to see to application of moneys advanced

Questions on the liability of a purchaser or mortgagee under an Act of Parliament to see to the application of his money do not often arise, as a proper clause of indemnity is always inserted in well-drawn Acts. But, in the absence of any such clause, it seems that a purchaser or mortgagee will be bound to see that the money he advances is applied for the purposes of the Act, notwithstanding that he pays it into the hand appointed by the Act to receive it (*r*).

(*n*) *Hardaker v Moorhouse*, 26 Ch D 417, at pp 422, 424

(*o*) *West v Berney*, 1 R & M 431, *Noel v Lord Henley*, M'Cl. & Y 302, *Stewart v Marquis of Donegal*, 2 J & Lat 636, *Goodright v Cator*, Doug 477, *Alexander v Mills*, 1 R. 6 Ch A 124

(*p*) *Walmsley v Butterworth*, 4 L J N S 253, *Alexander v Mills*, 1 R 6 Ch A 124, *Re Beddingfield and Herring's Contract*, (1893) 2 Ch 332

(*q*) As to land charges under various statutes made otherwise than by way of mortgage, see *post*, pp 1378 *et seq*
(*r*) *Cotterell v Hampson*, 2 Vern 5.

Guardians,
tenants for
life, &c may
charge allot-
ments with
expenses

ii.—Mortgages under Inclosure Acts — By the General Inclosure Act (s), husbands, guardians, trustees, committees, or attorneys of any owners of allotments and exchanged lands, being under coverture, minors, lunatics, beyond the seas, or under any other disability, and any of such owners, being tenants in tail, or for life or lives, or years determinable on a life or lives, or any other contingency, or otherwise interested, as therein mentioned (except rectors or vicars), may charge such allotments or exchanged lands with such sums, not exceeding 5*l* per acre, as the Inclosure Commissioners (t) shall, by their award, adjudge necessary to defray their shares of the charges and expenses incident to the obtaining any Inclosure Act and carrying the same into execution, and of charging the lands, and may mortgage or otherwise subject the lands to be charged to the person advancing the money for any term of years; or in case any person in possession, liable to a share of the expenses, shall choose to advance the money, then the commissioners may, by deed attested by two witnesses, mortgage or otherwise subject the lands to such person paying the same for any term of years for the payment of such sum, with interest to commence on the termination of his right in the premises; and such deed is to contain a covenant to pay and keep down the interest, so that no person shall be liable to pay arrears of interest other than for six calendar months preceding the time when his title to possession shall have commenced

These provisions are in substance re-enacted and extended by sect 133 of the General Inclosure Act, 1845 (u), which provides that tenants for life or in tail, or for any other estate of freehold or inheritance, and their husbands, guardians, &c, in case of disability or incapacity, and trustees, or feoffees for charitable, parochial, or other uses, or the majority of them, with the consent of the Commissioners (t), and incumbents, with the consent in writing of the bishop of the diocese, and the patron of the benefice, may charge their allotments with any money not exceeding 5*l* per acre towards their respective proportions of the inclosure expenses, and for securing the repayment of such money, with interest, may mortgage or demise their allotments; provided every such mortgage or demise, by or on behalf of a

Power to
mortgage
allotments

(s) 41 Geo. III c 109, s 30 Similar powers of mortgaging were commonly inserted in the particular Inclosure Acts passed previously to the

general Inclosure Act

(t) Now the Board of Agriculture

See 52 & 53 Vict c 30

(u) 8 & 9 Vict c 118

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person entitled for life, shall contain a covenant to keep down the interest during his life, so that no subsequent owner shall be liable to more than six months' arrears accrued previous to the time when his title shall accrue or commence, and, in the case of a benefice, the incumbent is to keep down the interest, and also to repay, in reduction of the principal, one thirtieth part of the money every year, until the whole be repaid; and every such mortgage is to be valid in law for the purposes of the Act, and every such mortgagee and his assigns is to have the like remedies in case of non-payment as are usual in the case of mortgages of a like nature.

Money raised for expenses to be paid to commissioners

By the statute 11 & 12 Vict. c. 99, s. 8, it is provided that on mortgage of allotments the money shall be paid to and applied by the commissioners, and their receipt shall be a sufficient discharge for the money.

Compensation for equality on partition.

By the statute 20 & 21 Vict. c. 31, ss. 7, 8, on an exchange or partition, the disproportion in value of allotments may be compensated by a rentcharge, provided the deficiency in value does not exceed one-eighth of the actual value of the land.

Concurrence of commissioners

The concurrence of the commissioners in a mortgage by a tenant for life or in tail is not required by the Act. It is sufficient that they have certified the amount to be raised, but in order to obtain from them a recognition of the fact of their having given their certificate, it is desirable that they should join in the mortgage.

Advance by tenant for life for expenses

If a tenant for life advances money for expenses under an Inclosure Act, and dies without having taken a mortgage on the estate, his executors will be entitled to have the charge raised (*x*).

Mortgage, &c. for purpose of redemption

iii.—Mortgages for Redemption of Land Tax—The Land Tax Redemption Act (*y*) provides that, for the purpose of redeeming land tax on lands belonging to individuals, the persons in possession, but not having the absolute estate, and persons beneficially entitled to the rents and profits (except tenants at rack rent and Crown tenants), may sell part of such lands or may mortgage the same, or grant any rentcharge to the amount of the land tax. sect. 51. Tenants in tail in England may convey by deed enrolled: sect. 52. And committees,

(*x*) *Drinkwater v. Coombe*, 2 S. & St. 340.

(*y*) 42 Geo. III. c. 116, s. 51.

guardians, executors, and administrators or trustees may sell or mortgage on behalf of persons under disability: sect 53 Such sales or mortgages of estates in England are to be made under the authority of two of the commissioners for the time being acting in the execution of the Act, to whom one month's previous notice of the intended sale or mortgage must be given, with a schedule stating the interest of the party desirous of selling or mortgaging, the name of the remainderman, and the particulars of incumbrances affecting the property. sects 54, 55. Prior mortgages are not to be affected by mortgages under this Act, except as to interest; and they are to be entitled according to their priorities to advance the money required for the redemption of the land tax in preference to all others. sect 114 All mortgages under this Act are to be enrolled within six months if the consideration exceeds 200l: sect 19 Proof of the execution of the mortgage deed by the commissioners is to be sufficient evidence that all requirements of the Act were duly complied with. sect 120.

Where the tenant for life has redeemed the land tax, the remainderman can compel his representatives to receive the consideration money and clear the estate (s)

Redemption
by tenant for
life

Where leaseholds are settled after redemption of the land tax, the charge of the land tax does not pass, but remains in the settlor (a).

Leaseholds

Where a lessee agreed to pay the land tax, and it had been redeemed by the landlord, the lessee was still liable to pay the amount (b).

Redemption
by landlord

The surplus sale moneys of land sold for redemption of land tax may be applied in discharge of incumbrances (c), but not in repairs or improvements (d).

Surplus sale
moneys.

iv.—Mortgages for Enfranchisement of Copyholds.—By the Copyhold Act, 1858 (e), lords and tenants of copyholds were empowered, with the consent of the commissioners, to charge manors and enfranchised lands respectively with the consideration or compensation for commutation or enfranchisement, and the expenses incident to the same; every such charge is to be made by a certificate of charge under the seal of the commis-

Power to raise
money for
enfranchise-
ment

(e) *Cousens v Harris*, 12 Q B 726.

(a) *Neame v Moorsom*, L R 3 Eq

91

(b) *Murray v Parker*, 19 Beav 305

(e) 42 Geo III c 116, s 100

(d) *Re Nether Stowey Vicarage*, L R 17 Eq 156

(e) 21 & 22 Vict c 94, ss 21—37

CHAPTER XXII

Priority of
charge

sioners, and to be transferable by indorsement. The forms of certificate and transfer are given in sects. 36 and 37. By sect 33 of this Act, it was provided that any such charge under that Act should be a first charge, having priority over all incumbrances affecting the land, except tithes commutation rent-charges, and statutory drainage charges.

By sects 23 and 24 of the Copyhold Act, 1887 (*f*), it was enacted as follows:—

“It shall be lawful for the owner of any land enfranchised under the Copyhold Acts, although his estate may be only a limited estate, to charge the land enfranchised with the compensation money paid for such enfranchisement, and also with the expenses attending such enfranchisement, or with any part thereof respectively, with interest thereon not exceeding five pounds per centum per annum, or by way of terminable annuity calculated on the same basis. Any and every such charge may be by deed or by way of mortgage with, under and subject to the provisions of the Conveyancing and Law of Property Act, 1881 (*g*), and shall be a first charge on the land, and shall have such priority as by the thirty-third section of the Copyhold Act, 1858 (*h*), is assigned to the charges there expressed to be first charges, and any moneys already invested or previously secured or charged on such land may be continued on the security of the same, notwithstanding the imposition of the said charges under the Copyhold Acts

“Any expenses paid by a lord in proceedings under the Copyhold Acts may be charged either on lands settled to the same uses as the manor or on rent-charges arising out of other enfranchisements within the manor, and every such charge shall be by deed or by way of mortgage with, under and subject to the provisions of the Conveyancing and Law of Property Act, 1881” (*g*).

Copyhold
Act, 1894

All the earlier Copyhold Acts are repealed by the Copyhold Act, 1894 (*i*), but so as not to affect any deeds, instruments, charges, &c. having effect under any enactment repealed by this Act.

The Act of 1894 contains the following provisions with regard to raising money for enfranchisement.—

Charge for
consideration
money, and
for expenses of
tenant.

Sect. 36.—“(1) Where an enfranchisement is effected under this Act, the tenant may charge the land enfranchised with all money paid by him as the compensation or consideration for the enfranchisement, and with his expenses of the enfranchisement, or with the consent of the lord, with any compensation payable, or with any part thereof respectively.

“(2) Where land is conveyed as the consideration for a voluntary enfranchisement under this Act, and the person conveying the land

(*f*) 50 & 51 Vict. c. 73
(*g*) 44 & 45 Vict. c. 41

(*h*) 21 & 22 Vict. c. 94, set out *sup.*
(*i*) 57 & 58 Vict. c. 46.

is absolute owner of the land conveyed, he may charge the land enfranchised with such reasonable sum as the Board of Agriculture consider to be equivalent to the value of the land conveyed, and with the expenses of the conveyance.

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"(3) Where a lord purchases under this Act a tenant's interest in land, he may charge the land purchased, and the manor and any land settled therewith to the same uses, with the purchase-money and the expenses of the purchase.

"(4) When a charge may be made under this section, the expenses of the charge may be made included in the charge

"(5) A charge under this section may be for a principal sum, and interest thereon, not exceeding five per cent per annum, or may be by way of terminable annuity calculated on the same basis.

"(6) A charge under this section may be by deed by way of mortgage, or by a certificate of charge under this Act

"(7) A charge under this section shall be a first charge on the manor or land subject to the charge, and shall have priority over all incumbrances whatsoever affecting the manor or land, except the rentcharge, and any charge having priority by statute, notwithstanding that those incumbrances are prior in date.

"(8) Any money secured on land may be continued on the security thereof, notwithstanding a charge under this section "

Sect 37 — "(1) Expenses incurred by a lord in proceedings under this Act may—

Charge for lord's expenses

"(a) be paid out of any consideration or compensation money (where it is a gross sum) arising in respect of the proceedings; or,

"(b) be charged, together with the expenses of the charge, on the manor, or on land settled to the same uses as the manor, or on any rentcharge arising in respect of the proceedings, or in respect of any enfranchisement made under this Act within the manor

"(2) A charge under this section shall be by deed by way of mortgage, or by a certificate of charge under this Act.

"(3) This section does not apply to the expenses of a purchase by the lord of a tenant's interest under this Act."

Sect 38 "If a tenant or person claiming to be tenant pays any money in respect of the compensation or consideration for an enfranchisement under this Act, and is afterwards evicted from the land enfranchised, he may claim against the land enfranchised the amount of the money, or so much of it as is not charged on the land under the other provisions of this Act, and that amount shall be a charge on the land with interest thereon at the rate of four per cent per annum from the date of the eviction "

Charge for consideration money where tenant's title proves bad.

Sect 39. "If a mortgagee pays under this Act any compensation or consideration money or expenses in respect of an enfranchisement of or redemption of a rentcharge on the mortgaged property, the amount so paid shall be added to his mortgage, and the mortgaged property shall not be redeemable without payment of that amount and interest thereon."

Charge for money paid by mortgagee.

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SECTION III.

OF MORTGAGES UNDER THE SETTLED LAND ACTS.

i.—Power for Tenant for Life to Mortgage Settled Lands —
Powers of mortgaging settled lands are conferred upon tenants for life thereof by sect 18 of the Settled Land Act, 1882 (*g*), for the purposes mentioned in the section, which is as follows.—

Mortgage for
equality
money, &c

“Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this Act ”

These powers are extended by sect. 11 of the Settled Land Act, 1890 (*h*), whereby it is provided that—

Power to raise
money by
mortgage

“(1.) Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly

“(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives, or during a term of years absolute or determinable.”

Transfer of
incumbrances
on land sold,
&c

In addition to the powers of mortgaging conferred upon him by the above sections, the tenant for life on a sale, exchange or partition, where there is an incumbrance affecting land sold or given in exchange, or on partition, “with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly” (*i*).

(*g*) 45 & 46 Vict. c. 38, s. 18
(*h*) 53 & 54 Vict. c. 69, s. 11.

(*i*) 45 & 46 Vict. c. 38, s. 5

The expression "any other part of the settled land" is extended to "land acquired by purchase or in exchange, or on partition" (*m*).

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Moneys arising from one part of a settled estate may, under this Act, be applied in discharge of incumbrances on another part (*n*).

A tenant for life is also empowered, by sect. 31 of this Act, to contract to make a mortgage, and to vary or rescind the same with or without consideration, provided that any such consideration, if paid in money, is to be capital money arising under the Act. It is obvious that the mortgage so contracted to be made, varied or rescinded, means a mortgage for a purpose authorized by the statutory powers

Power of
tenant for life
to enter into
contracts

ii.—Definitions for the Purposes of the Acts.—The Settled Land Acts, 1882 to 1890, are to be read together as one Act (*o*), and the following provisions (*p*) limit the meaning which is attached to the word "settlement" by these Acts.—

Definition of
"settlement"

"(1) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires

"(2) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement."

The question as to whether several instruments constitute one or more "settlements" has been before the Courts for decision in several cases, particularly with reference to the application of capital moneys in improvements (*q*).

(*m*) 45 & 46 Vict c 38, s 24 (1)

(*n*) *Re Lord Stamford's Settled Estates*, 43 Ch D 84, 95 See *Clarke v Thornton*, 35 Ch D 307

(*o*) See 53 & 54 Vict c 69, s 2

(*p*) 45 & 46 Vict c 38, s 2

(*q*) *Wheelwright v Walker*, 23 Ch D at p 759, *Re Earle and Webster's Contract*, 24 Ch. D 144, *Re Knowles'*

Settled Estates, 27 Ch. D 707, *Re Wright's Trustees and Marshall*, 28 Ch D 93, *Re Lord Stamford's Settled Estates*, 43 Ch D 84, *Re Mundy's Settled Estates*, (1891) 1 Ch 399, C A., *Re Byng's Settled Estates*, (1892) 2 Ch 219, *Re Marquis of Ailesbury and Lord Iveagh*, (1893) 2 Ch 345, *Re Freme, Freme v Logan*, (1894) 1 Ch 1, C A.

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Definitions of
"land,"
"tenant for
life," &c

Sect 2 of the Act of 1882 contains the following further definitions for the purposes of the Act:—

"(3) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land

"(4) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect

"(5) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement

"(6) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act

"(7) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent"

Meaning of
"possession,"

"Possession," by sub-sect. 10 (1) of this section, includes "receipt of income," and "income" includes "rents and profits," and, therefore, an equitable tenant for life answers the description in sub-sect. 5, and is capable of exercising the statutory powers (v).

The right to possession must be immediate, and not in reversion or expectancy (s). And it seems that a person whose life estate is preceded by a term of years vested in trustees for management of the property, &c., is not a tenant for life within the meaning of the Acts (t).

iii.—Persons having the Powers of a Tenant for Life—By sect 58 of the Act of 1882 it is enacted as follows.—

Enumeration
of other
limited
owners to
have powers
of tenant for
life.

"(1) Each person as follows shall, when the estate or interest of each of them is in possession (u), have the powers of a tenant for life under this Act as if each of them were a tenant for life as defined in this Act (namely).

"(1) A tenant in tail, including a tenant in tail who is by

(i) *Re Morgan*, 24 Ch D 114,
Naylor v Spendia's Contract, 34 Ch D
217. And see *Re Atkinson*, *Atkinson*
v Bruce, 31 Ch D 577

(s) *Re Jones*, 26 Ch D at p 741,
Re Atkinson, *Atkinson v Bruce*, *sup*

(t) *Re Clitheroe Estate*, 31 Ch D

140, *Re Strangways*, *Hickley v.*
Strangways, 34 Ch D 423

(u) *Re Jones*, 26 Ch D 736, *Re*
Clitheroe Estate, 31 Ch D. 135, *Re*
Strangways, *Hickley v Strangways*,
34 Ch D 423, *Re Atkinson*, *Atkinson*
v Bruce, 31 Ch. D. 577.

Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown (x), and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services (y).

“(ii) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event (z).

“(iii) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown :

“(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent (a).

“(v.) A tenant for the life of another, not holding merely under a lease at a rent (b) :

“(vi) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose (c)

“(vii.) A tenant in tail after possibility of issue extinct.

“(viii) A tenant by the curtesy (d)

“(ix.) A person entitled to the income (e) of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management (f) or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event (g)

“(2) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of

(x) This removes a restriction created by 33 & 34 Hen VIII c 20, and maintained by 3 & 4 Will IV c 74. The powers of a tenant for life are accordingly exercisable as regards the lands entitled in perpetuity of the Earldoms of Shrewsbury and Abergavenny, and of the Dukedom of Marlborough. See *Re Duke of Marlborough Estates*, 8 T L R 179, 582.

(y) The estates of Earl Nelson and the Duke of Wellington cannot be sold under this Act.

(z) See *Re Morgan*, 24 Ch D. 114, *Re James' Settled Estates*, 32 W R. 898, *Re Morhead's Settled Estates*, W N (1893) 180.

(a) As to the construction of this clause, see *Re Hazle's Settled Estate*, 29 Ch D 78.

(b) See *Re Atherton*, W N (1891) 85.

(c) See *Re Clitheroe Estate*, 31 Ch D. 135, *Re Strangways, Hockley v Strangways*, 34 Ch D 423. See, also, *Williams v Jenkins*, (1893) 1 Ch 700.

(d) For the purposes of this Act, the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife. See the Settled Land Act, 1884 (47 & 48 Vict c 18), s 8.

(e) See *Re Jones*, 26 Ch D 736, *Re Horne's Settled Estate*, 39 Ch D 89, *Re Pocock and Franke's Contract*, (1896) 1 Ch. 302.

(f) As to “expenses of management,” see *per Chitty, J*, in *Clarke v Thornton*, 35 Ch D. at p 311, *Re Lord Stamford's Estate*, 56 L T 484.

(g) See *Williams v Williams*, 9 W R 883, *Re Haynes, Kemp v Haynes*, 37 Ch D 306.

CHAPTER XXII the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised

“(3) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid ”

Infant

iv.—Mortgages of Settled Lands where the Owner is under Disability—An infant absolutely entitled to land is to be deemed tenant for life thereof (*h*) ; and where a tenant for life is an infant, the statutory powers may be exercised on his behalf by the trustees of the settlement, and, if there are none, by a person appointed by the Court for that purpose (*i*)

With regard to married women who are limited owners of settled lands, sect 61 of the Act of 1882 enacts as follows :—

Married woman

“(1) The foregoing provisions of this Act do not apply in the case of a married woman.

“(2) Where a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.

“(3) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act

“(4) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised

“(5) The married woman may execute, make and do all deeds, instruments and things necessary or proper for giving effect to the provisions of this section.

“(6) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act ”

Married Women's Property Act, 1882.

This enactment is materially affected by, and should be read in connection with, the provisions of the Married Women's Property Act, 1882 (*h*), which was passed later in the same session

Infant married woman.

If a married woman is an infant, this disability will prevent her from exercising the statutory powers under this section ;

(*h*) 45 & 46 Vict c. 38, s 59.

(*i*) *Ibid*, s 60. See as to consent on behalf of infant, *Re Duke of New-*

castle, 24 Ch D 129

· (*h*) 45 & 46 Vict c 75

such powers will, however, be exerciseable on her behalf under sections 59 and 60 of the Act (*l*) CHAPTER XXII

Inasmuch as a conveyance by a married woman under this section is made not by way of disposition under the Fines and Recoveries Act (*m*), but in exercise of a statutory power, it is conceived that the deed will not require acknowledgment, whether the power is exercised by herself alone, or by her and her husband together, and without regard to the date of her marriage Whether conveyance requires acknowledgment

Where real estate stood limited to trustees upon trust for a married woman for her life for her separate use without power of anticipation, and after her death to the use of such persons as she should by will appoint, and in default of such appointment to the use of herself in fee, it was held that if she had not been a married woman she would have had the powers of a tenant for life under sect. 58, sub-sect (1) (ix), and accordingly that she could make a title as such to a purchaser (*n*). Restraint on anticipation

But if a restraint on anticipation is annexed to an estate in fee simple of a married woman, who is of full age, there is no settlement, and she has not the powers of a tenant for life under the Act (*o*).

With regard to lunatics who are limited owners of settled lands, sect 62 of the Act of 1882 enacts that— Lunatics

“Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen’s sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act, and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate” Tenant for life, lunatic

It has been held that where an infant is of unsound mind the case falls within the ordinary jurisdiction of the Court (*p*)

By the Fines and Recoveries Act (3 & 4 Will IV. c 74), s 91, it was provided that the Court of Common Pleas, in the case of a husband being a lunatic (whether so found by inquisition or

(*l*) *Hearle v Greenbank*, 3 Atk 695
See Sug Powers, 177

(*m*) 3 & 4 Will IV c 74, ante,
p 316

(*n*) *Re Pocock and Pranken d’s Contract*,
(1896) 1 Ch 302

(*o*) *Bates v Kesterton*, (1896) 1 Ch.
159

(*p*) *Re Arrowsmith*, 4 Jur N S
1122, *Beall v Smith*, L R 9 Ch
A 86, *Re Edwards*, 10 Ch D 605.

CHAPTER XXII. not) may dispense with his concurrence in any case in which his concurrence is required by that Act, or otherwise (*g*), except where the Lord Chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be protector of a settlement in lieu of the husband (*r*). In order to obtain the order of the Court, it must be shown that the land is actually contracted to be conveyed (*s*).

A committee intending to exercise the statutory powers of a tenant for life must previously obtain the authority of the Court (*t*).

Notice must be given by the committee to the trustees of the settlement, as in any other case of an intended exercise of the statutory powers (*u*).

Settlement by
way of trust
for sale.

V.—Mortgages of Lands settled on Trust for Sale—Where land is settled by deed, will, or other instrument upon trust for sale, it seldom happens that it becomes necessary or is thought advisable to raise money by mortgage pending the sale for purposes authorized by the Settled Land Acts.

In such a case, however, it is provided by sect. 63 of the Act of 1882 that the person or persons, if more than one, concurrently beneficially entitled to the income of the land, shall be deemed to be tenant for life thereof, and that the trustees for sale, or the persons by the settlement declared to be trustees thereof for the purposes of the Act, are to be trustees of the settlement. But, by the Settled Land Act, 1884 (*x*), where land is settled on trust for sale, the trustees may exercise any powers of mortgaging, or other powers given to them by the settlement, without the consent of the tenant for life, unless required by the settlement; and the tenant for life cannot exercise his statutory powers over lands so settled without the leave of the Court. An order of the Court giving such leave may be registered as a *lis pendens*, and, until rescinded or varied, has the effect of suspending all powers of the trustees, in respect of which leave is given, created by the settlement. No person dealing with the trustees is to be affected by an order giving leave, unless it is duly registered as a *lis pendens*.

(*g*) *Re Murphy*, 4 Man. & Gr 635,
Re Turner, 3 C B 166

(*r*) See *Re Gaiskell*, 40 Ch D 416

(*s*) *Re Graham*, 13 W. R. 762

(*t*) *Re Ray's Settled Estates*, 25 Ch
D 464

(*u*) *Re Taylor*, W N (1883) 95.

(*x*) 47 & 48 Vict c 18, ss 6, 7.

vi.—Matters relating to the Exercise of Powers of Mortgaging CHAPTER XXII.
by Tenants for Life.—It is provided by sect. 53 of the Act of 1882 (y), that—

Tenant for
life trustee
for all parties
interested

“A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties”

Accordingly, where a tenant for life proposed to mortgage settled lands under sect. 11 of the Settled Land Act, 1890, under such circumstances that, by so doing, he would sacrifice the interests of certain annuitants thereon, which a sale of the settled land would preserve, the Court of Appeal, holding that the tenant for life (although acting *bonâ fide* and with a view to preserve the estates for those intended by the settlor to enjoy them) was not justified in the proposed course, and holding that the Court had power to interfere, restrained the tenant for life from mortgaging otherwise than subject to the rights of such annuitants (z).

Court will re-
strain tenant
for life from
exercising
power to
prejudice of
other parties

By sect. 50 of the Act of 1882 the statutory powers of a tenant for life, including powers of mortgaging, are not capable of assignment or release, and any contract not to exercise them is void, but these provisions are not to operate to the prejudice of any assignee for value of the estate or interest of the tenant for life. If, therefore, a tenant for life has mortgaged his life estate, a subsequent mortgage of the fee under the statutory powers will not affect the rights of the mortgagee of the life estate without his consent.

Powers not
assignable

The tenant for life can exercise his statutory powers, notwithstanding any prohibition or restriction attempted to be imposed by the settlement, or any limitation or provision therein contained, which tends, or is intended, to prohibit or restrain such exercise (a); and the exercise of a statutory power is not to occasion a forfeiture (b).

By sect. 56 of the Act of 1882 it is enacted as follows:—

“(1) Nothing in this Act shall take away, abridge, or pre-

Saving for
other powers.

(y) 45 & 46 Vict c 38

(z) *Hampden v Earl of Buckinghamshire*, (1893) 2 Ch 531, C A

(a) 45 & 46 Vict c 38, s 51 See *Re Raget's Settled Estates*, 30 Ch. D 161,

Re Outhwaite Estate, 31 Ch D 138, *Re Ames, Ames v Ames*, (1893) 2 Ch 479.

(b) 45 & 46 Vict c 38, s 52 See *Re Haynes, Kemp v. Haynes*, 37 Ch D. 306

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judicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction or otherwise, and the powers given by this Act are cumulative.

“(2) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail, and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act”

Where lands were settled by a private Act of Parliament made in 1853, whereby the trustees were empowered to sell or mortgage the lands, subject to certain restrictions, for the purpose of paying off incumbrances; the tenant for life in 1884 contracted to sell part of the settled lands; it was held that the power of sale conferred on tenants for life by the Settled Land Act, 1882, is absolute, and that the tenant for life in that case was entitled to sell free from the restrictions imposed by the private Act (c)

And by sect 57 of the same Act it is enacted that:—

Additional or
larger powers
by settlement.

“(1) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act

“(2) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement”

Express
power incon-
sistent with
statutory
powers.

Where (d) trustees of a settlement were empowered by the direction of the tenant for life to raise money by mortgage of the settled lands to be applied by him for improvements, similar to those authorized by the Settled Land Acts, with a proviso for the formation of a sinking fund out of the rents and profits to recoup to the estate the money raised, it was held that the tenant for life was not precluded from resorting to his statutory powers, but that, the express power having been resorted to, the rents and profits were liable to payment of instalments of the

(c) *Re Chaytor's Settled Estate Act*,
25 Ch D 651.

(d) *Re Sudbury and Poynton Estates*,
Vernon v. Vernon, (1893) 3 Ch. 74.

sinking fund, without prejudice to any application which the tenant for life might make under sect. 15 of the Settled Land Act, 1890 (e).

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By sect. 45 of the Act of 1882, a tenant for life, when intending to make a mortgage or charge, must give notice of his intention to the trustees of the settlement (f) and to their solicitor by registered letters sent through the post not less than one month before making the particular mortgage or charge (g).

Notice to trustees

By sect. 20 a mortgage or charge may, as regards lands mortgaged or charged, including copyholds or customary or leasehold land vested in trustees, be effected by deed for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the mortgage or charge. Such a deed is effectual to pass the land conveyed "discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder," except (1) estates, interests and charges having priority to the settlement; (2) estates, &c previously conveyed or created for securing money actually raised at the date of the deed; and (3) leases, fee farm and other grants, easements, and other rights and privileges subsisting at the date of the deed. The deed will pass the common law estate in fee simple or for any less interest in the case of freeholds or leaseholds, and in the case of copyholds the right to admission which the steward, on production of the deed, is required to enter on the court rolls.

Effect of mortgage deed

The money raised by a tenant for life under his statutory powers of mortgaging is capital money arising under the Acts (h), and must (unless paid into Court) be paid to the trustees (i), who should be parties to the mortgage deed for the purpose of acknowledging the receipt of the money; such receipt will be an effectual discharge to the mortgagee, and from being bound to see to the application of the money, or being liable for the loss or misapplication thereof, and from

Payment and application of moneys advanced on mortgage of settled lands.

(e) 53 & 54 Vict c 69.

(f) For definition of the expression "trustees of the settlement" for the purposes of the Acts, see 45 & 46 Vict c 38, s 2 (8), 53 & 54 Vict c 69, s 16.

(g) The provision in the stat 47 & 48 Vict c 18, s 5, making a general notice sufficient does not apply to mortgages.

(h) 45 & 46 Vict c 38, s 18, 53 & 54 Vict c 69, s 11.

(i) 45 & 46 Vict c 38, s 22.

CHAPTER XXII being concerned from seeing that the money advanced is required for any purpose of the Acts, or that no more than what is wanted is raised (*k*). A mortgagee dealing in good faith with a tenant for life is, as against all parties entitled under the settlement, to be conclusively taken to have complied with all the requisitions (*l*).

(*k*) 45 & 46 Vict c 38, s 40

(*l*) *Ibid*, s 54

CHAPTER XXIII.

OF MORTGAGES BY EXECUTORS AND TRUSTEES.

SECTION I.

OF MORTGAGES OF PERSONALTY BY EXECUTORS AND ADMINISTRATORS

i.—Of the Power to Mortgage Personalty of a Deceased Person.— General powers of executors.
 The whole personal estate of a testator, including leaseholds, vests in the executor, who, from the duties of his office and the nature of his trusts, must necessarily have an absolute power over it (a), whether specifically bequeathed (b), or limited in trust (c), or otherwise. His first duty is to provide for payment of debts; and, if the general undisposed-of property or the fund expressly provided by a testator is not sufficient for such purpose, the property specifically bequeathed or given in trust must be resorted to. Nor can a testator, by any testamentary disposition of his personal estate, frustrate or delay the claims of his creditors (d).

In order to carry out this duty, it often happens that the Power of sale executor must sell or otherwise dispose of the assets; and, if he does so, the assets cannot be followed by any creditor or legatee into the hands of an alienee (e). For no one would deal with an executor if liable afterwards to be called to account (f). In case of misapplication of the money, the creditor or legatee has no remedy against the purchaser, but only against the executor, and notice of the will does not prejudice the purchaser in this respect (g).

(a) *Nugent v Gifford*, 1 Atk 463(b) *Ewer v Corbett*, 2 P Wms 149, *Burton v Stonard*, *ibid* 150, *Langley v Earl of Oxford*, Amb 17, *Andrew v Wrigley*, 4 Bro C C 125(c) *M'Leod v Drummond*, 17 Ves 152, at p 161(d) *Andrews v Wrigley*, *sup*(e) *Whale v. Booth*, 4 T. R. 625, n., *Nugent v Gifford*, *supra* See *Spack-**man v Tumbrell*, 8 Sim 260, *Dukes v Broadmead*, 2 De G F & J. 566, *Wolverhampton Bank v. Marston*, 7 H & N 148(f) Per Lord Mansfield, in *Whale v Booth*, *supra*(g) *Ewer v. Corbett*, 2 P Wms 148. See *Andrews v Wrigley*, 4 Bro. C C. 125.

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Mortgage
of assets by
executor

As the executor may absolutely dispose of the testator's assets for the general purposes of the will, there seems no good reason why, in the exercise of a sound discretion, and presuming the language of the will does not peremptorily require an absolute sale, the executor may not raise the money required by a partial sale or mortgage of the assets. Accordingly, this proposition has been repeatedly recognized by high authorities (*h*) Lord Loughborough, indeed, is reported to have said, that a mortgage is not a natural way of raising money, and that it may lead to an inquiry as to the circumstances of the testator's estate (*i*); but this observation, it is conceived, must be considered as applying to transactions attended with circumstances exciting suspicion of fraud. The right of executors to mortgage the leaseholds or other personalty of a testator or intestate may be regarded as established beyond question.

Power to sell
or mortgage
a specific
legacy

The power of executors to dispose of a specific legacy seems to have been questioned in an early case (*k*); and Lord St Leonards, in his Treatise on Vendors and Purchasers, raised a doubt whether it is safe to take an assignment of a specific legacy from the executor without the concurrence of the specific legatee, lest the executor should have assented to the bequest, and he cited *Thomlinson v Smith* (*l*). It is submitted that both the cases referred to were complicated by circumstances of fraud. If a purchaser or mortgagee *bonâ fide* deals with an executor within a reasonable time after the testator's death, and obtains possession of the muniments of title, it is conceived that a specific legatee would not be permitted to set up the executor's assent against the sale or mortgage, for, by sale and delivery, the title of the purchaser or mortgagee is complete (*m*).

Where the specific legatee is also an executor, no difficulty arises, as the purchaser or mortgagee is not bound to inquire as to the assent (*n*). But in other cases it is advisable to require the concurrence of the specific legatees.

Insolvent
estate.

A mortgage of assets by an executor to secure a debt of his testator is valid, though the estate is insolvent (*o*).

(*h*) *Mead v Lord Orrery*, 3 Atk 239; *Scott v Tyler*, 2 Dick 724, *M'Leod v Drummond*, 17 Ves 154, *Berry v Gibbons*, L R 8 Ch App 747, *Re Cooper*, 20 Ch D 611, C. A.

(*i*) *Andrew v Wrigley*, 4 Bro C C at p. 138.

(*k*) *Humble v Bell*, 2 Vern 444

(*l*) *Finch*, 378

(*m*) See *Scott v Tyler*, 2 Dick 712

(*n*) *Taylor v Hawkins*, 8 Ves 209, *Cole v Miles*, 10 Ha 179

(*o*) *Earl Vane v Rigden*, L R 8 Ch A 663.

An administrator derives his authority entirely from the appointment of the Court (*p*), but after the administration is granted, the power and interest of the administrator over personalty is equal to the power and interest of the executor (*q*).

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Powers of administrator

An administrator *durante minore ætate* has all the powers of an executor (*r*)

Although, generally speaking, after an administration decree, powers can only be exercised with the sanction of the Court (*s*), yet the power of an executor to mortgage the assets is not affected by an administration decree, where no receiver has been appointed, nor any injunction granted restraining the executor from dealing with the assets (*t*)

Effect of administration decree

The mere institution of an action does not prevent executors from dealing with the assets (*u*)

Institution of proceedings

An executor or trustee is, however, entitled to apply for the sanction of the Court even before decree, and will be allowed his costs of such application (*v*)

Application for sanction of Court

An application to sanction raising of money by mortgage of a testator's estate cannot be made by originating summons under Order LV. r 3 (*y*) In the case referred to, the summons was amended by making it one for the administration of the real estate under Rule 4, so as to allow of the application being subsequently made for the sanction of the Court

Form of application

ii.—Application of Moneys advanced.—As a general rule, a mortgagee is not bound to see to the application of money advanced by him to an executor or administrator, unless he has notice that the money is intended to be applied otherwise than for the purposes of the administration of the estate (*z*) The mortgage need not, therefore, state that the money is wanted for the purposes of administration, for, in order to vitiate the security, it must be shown that the mortgage was not for the payment of debts, and that the mortgagee knew, or ought to have known, that such was the case (*a*) And by statutory enactment,

Mortgagee not bound to see to application of money

(*p*) *Wankford v Wankford*, 1 Salk 301

(*q*) *Shep Touchst* by Preston, 474

(*r*) *Re Cope*, 16 Ch D 49

(*s*) *Farwell on Powers*, 41 *et seq*

(*t*) *Berry v Gibbons*, 1 L R 8 Ch A 747, *Re Barrett, Whitaker v Barrett*, 43 Ch D 70

(*u*) *Neeses v Burridge*, 14 Q. B 504

See *Cafe v Bent*, 3 Ha. 245

(*z*) *Turner v Turner*, 30 Beav 414

See R S C, Ord LV r 2 (14)

(*y*) *Walley v Robinson*, W N. (1884) 144

(*z*) *Scott v Tyles*, 2 Dick 712.

M'Leod v Drummond, 17 Ves 151.

Elliot v Meerman, Barn Ch R 78

(*a*) *Bonney v Rudgan*, 1 Cox, 145.

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in the absence of fraud or notice of any impropriety, the receipt in writing of an executor or administrator will effectually exonerate the person paying the money advanced from seeing to its application or being answerable for the misapplication thereof (*b*).

Mortgage to secure executor's own debt.

It is a settled rule of equity (*c*) that, generally speaking, an executor cannot make a valid assignment or pledge of the assets as a security for his own debt (*d*). Two decisions of Lord Hardwicke sustaining such transactions (*e*) appear to be referable to the particular circumstances of those cases (*f*).

Mortgage partly for purposes of administration

When the mortgage is partly for purposes of administration and partly for the private purposes of the executor, the security is valid to the extent only to which it is shown that the money was applied for the purposes of administration (*g*).

Executor beneficially entitled to share

Where an executor who is beneficially entitled to a share in his testator's general estate, deposits the title deeds of the estate to secure his own debts, the deposit only affects his own interest (*h*).

Executor also specific legatee

If the executor is also specific legatee, a mortgage from him of the specific legacy for satisfaction of his private debt will be safe, unless it can be shown that the mortgagee knew that there were debts of the estate unpaid (*i*). But of course, on failure of the security, the mortgagee cannot prove against the estate (*h*).

Fraudulent dealing with executor.

Fraud or covin will vitiate any transaction, and turn it to a mere colour. If one concert with an executor, by obtaining the testator's effects at a nominal price, or at a fraudulent under-value, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private

(*b*) 56 & 57 Vict c 59, s 20, repealing (s 51) and re-enacting 44 & 45 Vict c 41, s 36

(*c*) Formerly, at law, it was laid down that an executor might dispose of the assets in satisfaction of his own debt in the absence of fraud on the part of the creditor *Wheale v Booth*, 4 T R 625, n., *Farr v Newman*, 4 T R 642, 645 See *Doe v. Fallows*, 2 Cr & J 483

(*d*) *Bonney v Ridgard*, 1 Cox, 145, *Scott v Tyles*, 2 Dick 712, *Chane v. Drake*, 2 Vern. 616, *Andrew v. Wrigley*, 4 Bro C. C. 136, *Hill v. Simpson*, 7 Ves. 152, *M'Leod v. Drummond*, 17 Ves. 154, 170, *Wilson v. Moore*, 1 My.

& K 337, *Eland v Eland*, 4 My & Cr 420, *Haynes v Forshaw*, 11 Ha 95; *Collinson v Lister*, 7 De G M & G 634, *Re Morgan, Pilgrim v Pilgrim*, 18 Ch D. 93, 98, *Ricketts v. Lewis*, 20 Ch D. 745.

(*e*) *Nugent v Grifford*, 1 Atk 463; *Mead v Lord Orreny*, 3 Atk 235

(*f*) *Taner v Iwe*, 2 Ves Sen 466

(*g*) *Carter v Sanders*, 2 Drew 248 See *Re Brettie, Brettie v. Bundett*, 2 De G J & S 244

(*h*) *Farhall v. Farhall*, L R 7 Ch. A 123

(*i*) *Taylor v Hawkins*, 8 Ves 209, *Hall v Andrews*, 20 W R. 799

(*k*) *Farhall v. Farhall*, *sup.*

debt of the executor, or in any other manner contrary to the duty of the office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable to the full value (l).

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So, if a person lends money on mortgage to an executor or administrator collusively, and with knowledge that the borrower is acting fraudulently in violation of his trust, and to the detriment of the persons beneficially interested in the estate, the transaction will be wholly vitiated by the fraud, and the security will be void and incapable of being enforced (m).

Even in the absence of direct fraud, a mortgage of assets by an executor or administrator may be incapable of being enforced if the mortgagee had, at the time of the advance, actual or constructive notice (n) that the money was intended to be applied for purposes other than those of the administration of the estate (o).

Notice of intended application of money to improper purpose.

There have been several decisions as to what circumstances amount to notice that the mortgage is for the executor's own purposes (p). The Court will not lightly impute notice to a mortgagee dealing with an executor (q). So, the fact that a mortgage included property of the executor as well as property of his testator was held not to be sufficient (r). And it is not enough, in order to impeach a mortgage of assets, to show that it was made to secure a debt originally contracted by an executor on his personal security, without reference to his representative capacity, or to the assets (s).

In the absence of fraud or collusion, though a mortgage by an executor, who is also specific legatee of his legacy, to secure his own debt, is generally valid (t), yet if the mortgagee is at the time of making the advance aware that the testator's debts are unpaid, he will not be allowed to retain the mortgaged legacy as against the creditors (u).

Notice that debts are unpaid

Again, the circumstances of the transaction may be such as to affect a mortgagee of assets with notice that the money

Notice that intended purpose is not

(l) *Scott v Tyles*, 2 Dick 712 See *Rice v Gordon*, 11 Beav 265

(m) *Doe v Fallows*, 2 Cr & J 483 See *Re Scott and Alvarez's Contract*, (1895) 1 Ch 596, C A

(n) See further, as to what will amount to constructive notice of prior equities, *post*, pp 1313 *et seq.*

(o) *Hill v Simpson*, 7 Ves 152

(p) *Collingwood v Russell*, 10 Jur. N S 1063, *Howard v. Chaffers*, 2 Dr & S 236; *Farhall v. Farhall*, L R. 7 Ch A 123.

(q) *Collingwood v. Russell*, *sup.*

(r) *Barrow v Griffith*, 11 Jur N S 6.

(s) *Miles v Durnford*, 2 De G. M. & G 641

(t) *Supra*, p 400

(u) *Crane v. Drake*, 2 Vern. 616.

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incident to
the adminis-
tration.

cannot be required for purposes properly incident to the administration of the estate. So where an administratrix, twenty years after the intestate's death, mortgaged leaseholds of the intestate held under old leases, which were not produced, in order to raise money for repairing the property of which, being also one of the next of kin, she was in occupation, it was held that the lapse of time raised the presumption that there were no debts of the testator remaining unpaid, and that the onus of proving that the leases contained covenants by the lessee to repair was on the mortgagee, and that this not having been proved, the presumption was that the borrower required the money, not for purposes of administration, but for her own beneficial enjoyment of the property, and accordingly the charge was disallowed except to the extent of the share of the administratrix as next of kin (x).

Notice of par-
ticular trust

Further, "personal estate may be clothed with such a particular trust that it is possible the Court, in some cases, may require a purchaser of it to see the money rightly applied" (y). On this principle, where an administrator was empowered by the next of kin by a memorandum in writing to borrow on mortgage of certain leaseholds forming part of the intestate's estate such sums as he might require for certain purposes specified in the memorandum, and deposited the lease and memorandum as a security for a debt of his own; the deposittee did not give notice of his charge to the next of kin, who subsequently, on settlement of the accounts of the estate, withdrew the authority to borrow; the administrator then executed to the trustee a formal mortgage of the leaseholds; it was held that the mortgage did not create a valid charge on the shares of the next of kin (z).

Appropriation
of particular
fund to debts.

If a particular fund is pointed out by the will for the payment of debts, it may become necessary for a mortgagee to inquire if that fund has been exhausted.

Conflict of
equities.

A mortgagee, even in the absence of fraud or notice that the money is to be improperly applied, may find his security prejudiced, unless he has been careful to protect himself by obtaining the legal estate in the mortgaged property against

(x) *Ricketts v. Lewis*, 20 Ch D. 745
See *Collinson v. Lister*, 7 De G. M. &
G. 634.

(y) Per Lord Kenyon, in *Elliot v. Merriman*, 2 Atk 41.

(z) *Jones v. Stohwasser*, 16 Ch D.
577.

the prior equitable rights of those claiming under a will or intestacy. So, where an executor took, in his own name, a renewal of a lease belonging to his testator's estate, and deposited the renewed lease by way of equitable mortgage for money advanced to him for his own purposes by a person who did not know that the borrower was an executor, it was held that the lease, being in equity a part of the testator's estate, and the conflict being between two equitable titles, the equity of the estate was prior to the equity of the mortgagee, and must prevail (*a*).

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Where a mortgage by an executor or administrator is set aside on the ground of fraud or negligence, a creditor, or a legatee, whether pecuniary, specific, or residuary, may follow the assets into the hands of the mortgagee (*b*).

Assets may be followed.

But relief will be refused if there is unreasonable delay in making a claim (*c*).

Delay

iii.—Subject-Matter and Form of Mortgage.—A mortgage of personal property given by an executor administrator may be either of legal or equitable assets (*d*), or of mere choses in action (*e*).

Subjects of mortgage

The mortgage may be by actual assignment, or by deposit (*f*). In dealing with the leaseholds of a testator or intestate, an executor or administrator may, in a proper case, grant an under-lease (*g*); and, accordingly, it would seem that he may give a mortgage by way of sub-demise. A dealing with one of several executors will be valid, for each is competent (*h*), and one executor may open a separate account with a banker on the executorial account, and validly pledge securities of the estate with him (*i*).

Form of mortgage.

An executor or administrator may properly give to a mortgagee a power of sale over the mortgaged property (*k*), such powers are now implied by virtue of the statute (*l*) in every mortgage by deed, unless expressly excluded.

Executor or administrator may give power of sale

(*a*) *Re Morgan, Pillgrem v Pillgrem*, 18 Ch D 92, C A. See *post*, p 1238.

(*b*) *Hill v Simpson*, 7 Ves 152, *Wilson v Moore*, 1 My & K 337.

(*c*) *Elliot v Merriam*, 2 Atk 41, *Andrew v Wrigley*, 4 Bro C C 125, *McLeod v Drimmond*, 17 Ves 152.

(*d*) *Nugent v Gifford*, 1 Atk 463.

(*e*) *Scott v Tyler*, 2 Dick 712, *Earl*

Vane v Ruggden, L R 5 Ch A 663.

(*f*) *Ibid*.

(*g*) *Oceanic Steam, & Co v. Sutherland*, 16 Ch D 236, C A.

(*h*) *Scott v Tyles*, 2 Dick 725.

(*i*) *Child v Thorley*, 16 Ch D 151.

(*k*) *Russell v Place*, 18 Bear 21, *Crunkshank v Duffin*, L R 13 Eq 555.

(*l*) 44 & 45 Vict c. 41, s 19.

AP XXIII
cial
enants

An executor must not, however, clog the right of redemption, on payment of principal, interest, and costs, by the insertion in the deed of extraneous matters such as a consolidation clause, providing that he shall not be entitled to redeem without paying all moneys due to the mortgagee under every other mortgage made by him otherwise than as executor; and, if he do so, the estate will not be bound, and any liability in respect of such matters will fall on the executor personally (*m*).

SECTION II.

OF MORTGAGES OF REALTY BY EXECUTORS, ETC., FOR PURPOSES OF ADMINISTRATION.

arge of
bts, &c
thorizes
rtgage.

i.—Charge of Debts.—If a testator expressly or by implication charges his real estate with the payment of his debts or legacies, this will authorize a sale or mortgage of the real estate for that purpose. If, however, there is no such charge, real estate cannot be disposed of by the executors, or by the trustees of the will, unless expressly empowered to dispose of it (*n*).

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As regards cases where there is no express or implied charge of debts upon the realty, by several statutes (*o*) the real estates of deceased persons have been rendered answerable in the hands of the heir or devisee for the payment of the debts of his ancestor or testator; and the Court may order the money required for the payment of such debts to be raised by sale or mortgage (*p*). By the stat 11 Geo. IV & 1 Will IV c. 47, s. 12, where an estate settled by will upon a person or persons having a limited interest, and an order for sale or mortgage is made, such persons may be directed to convey, and such conveyance will effectually pass the fee simple; and by sect. 11 of the last-mentioned Act, where the heir or devisee is an infant, the Court may order an immediate sale and conveyance of the real estates for payment of the debts.

bled lands.

And in case of settlement by will upon persons having a limited interest, a conveyance is to be directed for the payment of debts (*q*).

(*m*) *Thorne v Thorne*, (1893) 3 Ch 196.

(*n*) See *post*, p 417. As to mortgages by trustees under express powers, see *post*, pp. 424 *et seq*.

(*o*) 11 Geo. IV & 1 Will IV c. 47; 3 & 4 Will. IV c. 104. See also 32 &

33 Vict c 46, and 38 & 39 Vict c 77.

(*p*) As to orders for raising money to pay debts by mortgage of real estate in an administration action, see *Seton*, 1230 *et seq*.

(*q*) 11 Geo IV and 1 Will IV c 47, s. 12. And see 11 & 12 Vict. c. 87.

Whether the Court had power under this Act to decree the debtor's estate to be mortgaged, instead of being sold for payment of debts, and to direct the infant heir or devisee to convey under sect. 11, was doubtful (r); but the doubt was removed by the later Act, 2 & 3 Vict c. 60, which provided that the surplus of the moneys raised by sale or mortgage under 1 Will. IV. c. 47, should devolve in the same manner, and belong to the same persons as the lands would have done if not so sold or mortgaged.

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Surplus
moneys

The power of mortgaging realty given to trustees and executors by Lord St. Leonards' Act, to be presently considered, arises only where a testator has charged his realty with the payment of debts or legacies. Even under the old law, prior to the Act, the power of an executor to alienate his testator's realty for payment of debts, &c, depended on the question as to whether the will indicated an intention that the debts should be charged on the realty. The question whether the expressions of a particular will sufficiently indicate such an intention, is often one of great difficulty, and has given rise to some conflict of judicial opinion (s); but the tendency of later decisions has been strongly in favour of implying the charge from general expressions.

What expres-
sions in a will
amount to a
charge of
debts, &c

A general direction in a will that debts shall be paid, as a general rule charges them on all the testator's real estate (t). But a mere authority to trustees, who were also executors, "to adjust and pay all claims" upon the testator's estate, was held not to charge the debts on the real estate (u).

Effect of
general direc-
tion to pay
debts

A direction to pay debts may be given by informal words, as by the expressions "my debts being satisfied, I give, &c" (x), or "after payment of debts, I give, &c." (y). And a general devise and bequest of realty and leaseholds and all the residue of the testator's personal estate after payment of his debts, was held to charge the realty as well as the personalty (z).

What
amounts
to such a
direction

Indeed a charge of debts on realty may be implied though Blended fund

(r) Cf *Holme v. Williams*, 8 Sim 557, and *Smethurst v Longworth*, 2 Keen, 603

(s) See the cases cited in *Jarman on Wills* (5th ed), vol II. pp 1390 et seq

(t) *Shallcross v Finden*, 3 Ves 737, *Clifford v Lewis*, 6 Madd 33, *Ball v Harris*, 4 My & Cr 264, *Shaw v*

Borner, 1 Keen, 559, *Harding v Grady*, 1 Dr & War 430, *Elliot v Montgomery*, 1r R 5 Eq 214

(u) *Re Head's Trustees and Macdonald*, 45 Ch D 310, C A

(x) *Harris v Ingledew*, 3 P Wms 91

(y) *Shallcross v Finden*, 3 Ves 737

(z) *Withers v Kennedy*, 2 My & K 607.

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the will does not refer to debts, as when the will directs realty and personalty to be sold, without saying by whom, and the proceeds to be divided as a blended fund, then, inasmuch as the personalty is necessarily liable to the debts, a charge thereof will be implied so as to enable the executors to sell or mortgage the realty for payment of debts (*a*)

Contrary
intention

But the general directions may be overruled by expressions of contrary intention contained in the will

So a direction that the executors shall pay the debts, raises a presumption that the testator intended that the debts shall be paid only out of the property which passes to the executor, and will accordingly exonerate the realty (*b*)

Devise to
executor of
realty charged
with debts

The presumption, however, may be rebutted if there is a devise or appointment of real estate to the executors, whether beneficially (*c*), or in trust (*d*), and in such cases the real estate will be generally held to be charged accordingly so as to enable the executors to sell or mortgage it. A devisee, who is also an executor, having real estate charged with the payment of debts, is, in effect, in a position similar to that of an executor dealing with personal estate, and, as an executor dealing with the personal estate of a testator, may sell it or mortgage it for the purpose of raising money, and as, in the case of personalty, it is to be inferred, unless the contrary is shown, that he is doing that for the purpose of paying debts, so, with regard to one holding real estate charged with the payment of debts, and filling the position of executor, it is also to be inferred, if he raises money by sale or mortgage of that real estate, that he is using the money as he properly ought to use it, for the same purpose (*e*).

But the question as to whether a devise of real estate to executors, coupled with a direction to them to pay debts, amounts to a charge upon the real estate, is one of intention (*f*). So

(*a*) *Tylden v Hyde*, 2 S & St 238, *Ward v Deron*, cited 11 Sim 160, *Forbes v Peacock*, 11 Sim 152, 12 Sim 528, 11 M & W 630, *Mackintosh v Barber*, 1 Bing 50

(*b*) *Wasse v Heslington*, 3 My & K 495, *Cool v Dawson*, 29 Beav 126, *Re Bailey, Darley v Bailey*, 12 Ch D 268, 272

(*c*) *Hennell v Whitaker*, 3 Russ 343, *De Burgh Lawson v De Burgh Lawson*, 41 Ch D 568 It makes no difference if the devise is for life or in tail *Finch v. Hattersley*, 3 Russ 345, n., *Harris*

v Watkins, Kay, 438, *Cool v Dawson*, 29 Beav 123

(*d*) *Barker v Duke of Devonshire*, 3 Mer 310, *Donmay v Bonradarle*, 10 Beav 263, *Harland v Murrell*, 27 Beav 204, *Re Tanqueray-Willaine and Landau*, 20 Ch D 465, C A

(*e*) *Per Lord Cairns, L C*, in *Cosser v Cartwright*, L R 7 H L 731, at p 736 See *Re Penn and Furse's Contract*, (1894) 2 Ch 101

(*f*) *Re Bailey, Bailey v Bailey*, 12 Ch D. 268

where the entirety of the real estate is not devised to the executors, it is a question of intention to be collected from the whole will, so that where the devise is to one only of several executors (*g*), or unequal benefits are given to the executors, the general rule would not apply and there would be no charge, and, consequently, no power to sell or mortgage (*h*). So where part of the real estate was devised to sons, and part to the executors in trust for daughters; the real estate devised to the daughters was held not to be charged with the debts (*i*). These cases, as well as cases where real estate has been devised to a person on condition that he pay the debts (*h*), are treated by a learned author as amounting to a trust, and not to be a charge for payment of debts (*l*).

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Again, a contrary intention may be indicated by reason of there being an express charge of debts on a specific part of the real estate, so as to exonerate the residue of the real estate (*m*), but the specific charge must be clearly expressed (*n*).

Specific charge

A general charge of debts will charge specifically-devised real estate (*o*); but a charge of debts by the will, will not include lands specifically devised by a codicil (*p*).

Extent of general charge of debts

ii.—Charge of Legacies—As regards legacies, the intention to charge them upon real estate must appear very clearly by the will so as to enable the executors to sell or mortgage it for the purpose of paying the legacies (*q*). A mere general gift of legacies will not charge the real estate (*r*); and it seems very doubtful whether a general direction that legacies shall be paid, or a direction to the executors to pay them, coupled with a devise of realty to them, would charge the legacies on the real estate generally, or on the real estate so devised to them, either beneficially or in trust for other persons. The affirmative has been held in two cases (*s*), but has been dissented from in another

What will amount to a charge of legacies

(*g*) *Warren v Davis*, 2 My & K 49
See *Marshall v Gungell*, 21 Ch D 790

(*h*) *Harris v Watkins*, Kay, 438

(*i*) *Re Bailey*, *Bailey v Bailey*, 12 Ch D 268

(*k*) *Dillon v Cruise*, 3 Ir Eq R 70,
79, *Bradgman v Dove*, 3 Atk 201,
Dolton v Hewen, 6 Madd 9, *Page v Adam*, 4 Beav 269, *Lochhart v Hardy*, 9 Beav 379

(*l*) *Will Real Assets*, pp 44—48

(*m*) *Palmer v Graves*, 1 Keen, 545,
Conser v Cartwright, L R 7 H L 731

(*n*) *Taylor v. Taylor*, 6 Sim 246,
Jones v Williams, 1 Coll 156 See

Wrigley v Sykes, 21 Beav 337

(*o*) *Maskell v Farrington*, 3 De G J & S 338, *Earl of Portarlington v Dame*, 4 De G J & S 161, *Mannor v Greener*, L R 14 Eq 456

(*p*) *Wheeler v Claydon*, 16 Beav 169,
Quain v Harvey, 5 L R Ir 622

(*q*) *Bench v Biles*, 4 Madd 188 See
Bright v Larcher, 3 De G & J 148,
Fried v Peckett, 29 Beav 568

(*r*) *Kightley v Kightley*, 2 Ves Jun 328

(*s*) *Alcock v Spanhawk*, 2 Vern 228,
Preston v Preston, 2 Jur N S 240

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case (r); the other cases usually cited in support of the proposition appear to have been cases where the direction to pay legacies was followed by a gift of the residue of real and personal estate.

Direction to
pay legacies

Where a testator directs his executors to pay his debts, or the payment of his debts and legacies (s), or of legacies only (t), or if he merely gives legacies (u), and also devises and bequeaths the residue of his real and personal estate together, the result is to charge the debts or legacies upon the real estate, unless a contrary intention is indicated, as by an express direction that the payment shall be out of personal estate (x). But this rule will not apply where the realty and personalty are separately devised and bequeathed (y).

Extent of
charge of
legacies

A general charge of legacies on real estate will not charge realty specifically devised (z), unless the charge extends also to the payment of debts (a).

iii.—Charge of Annuities.—An annuity is a legacy (b); so, if legacies and annuities are given by a will, which contains a charge of debts and legacies on real estate, the annuities are charged on the real estate (c).

Annuities,
whether
charged on
corpus

Whether an annuity is charged on the *corpus*, so as to be raiseable by sale or mortgage thereof, or only on the rents and profits, does not depend upon any abstract rule of law, but upon the intention to be gathered from the instrument (d).

Cases where
the annuity
was not
charged on
corpus

There is no charge on the *corpus* where an annuity is directed to be paid out of rents and profits, or out of interest without more (e), nor if it is to be paid out of the annual rents and profits (f);

(r) *Parke v Fearnley*, 2 S & St 592. See also *Re Cameron*, *Nixon v Cameron*, 26 Ch. D 19.

(s) *Greville v Browne*, 7 H L C 689, *Wheeler v Howell*, 3 K & J 198, *Gainsford v Dunn*, L R 17 Eq 405, *Re Brooke, Brooke v Rooke*, 3 Ch D 630; *Re Bailey, Bailey v Bailey*, 12 Ch D 268, 274, *Elliott v Dearsley*, 16 Ch D 327, C A., *Re Bauden*, *National Provincial Bank of England v Cresswell*, (1894) 1 Ch 693, 700, *Re Boards, Knight v Knight*, (1895) 1 Ch 499.

(t) *Cross v Kennington*, 9 Beav 150.

(u) *Elliott v Hancock*, 2 Vern 143, *Greville v Browne*, *supra*, *Re Bellis's Trusts*, 5 Ch D 504, *Re Dyson and Fowler*, (1896) 2 Ch 720.

(x) See *Gyett v. Williams*, 2 J. & H

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(y) *Bray v. Stephens*, 12 Ch D 162, (z) *Spong v Spong*, 3 Bl N S 34, *Connon v Connon*, L R 7 H L 168.

(a) *Mashell v Farrington*, 3 De G J & S 338.

(b) *Sibley v Perry*, 7 Ves 522, *Bromley v Wright*, 7 Ha 334, *Ward v Gray*, 26 Beav 485, *Gaskin v. Rogers*, L R 2 Eq 284.

(c) *Heath v Weston*, 3 De G M & G 601.

(d) *Clifford v Arundell*, 1 De G F & J 307, 311.

(e) *Earle v Bellingham*, 24 Beav 445, *Clifford v Arundell*, *sup*, *Miller v. Huddleston*, 3 Mac & G 513, *Hindle v Taylor*, 5 De G M & G 577.

(f) *Forbes v Richardson*, 11 Ha 354, *Marsh v. Marsh*, 2 Jur. N.S. 348.

but the deficiency of one year was made good out of the rents of subsequent years (*g*); nor is the *corpus* charged when the annuity is to be paid out of the rents and profits only during the life of the annuitant (*h*) nor where, after a direction to pay an annuity out of the rents, the surplus of the rents is disposed of (*i*); nor where it is to be paid out of the rents and profits, or "other moneys held upon the trust," the words "other moneys," meaning moneys "*ejusdem generis*" (*k*).

A distinction is made where the question is raised, not between an annuitant and the residuary legatee, but between a tenant for life and remainderman (*l*), in which latter case the property is intended to be kept intact during the life of the annuitant to go to the remainderman (*m*).

Question between tenant for life and remainderman.

When an annuity is given by will out of land, by way of legal rent-charge, with powers of distress and entry, and the estate is devised in settlement, the deficiency of the annual rents to answer the annuity will not, at least in the lifetime of the annuitant, be made good by a sale or mortgage of the estate, unless the Court finds it necessary to make a decree for the sale or mortgage for some other purpose, as for payment of debts (*n*). But *secus* where the annuitant is dead, and the estate is unsettled (*o*).

A power to recover annuities when in arrear by "distress and sale," as rents are recovered by law, is insufficient to charge the *corpus* (*p*).

If trustees are directed to lay out sufficient money to produce an annuity, and the funds set apart fail, the deficiency will not be raised out of the capital (*q*), unless, upon the construction of

(*g*) *Ibid* *Anderson v Anderson*, 33 Beav 223

(*h*) *Foster v Smith*, 1 Ph 629, *Earle v Bellingham*, 24 Beav 445 See *Phillips v Gutteridge*, 3 De G J & Sm 332

(*i*) *Stelfox v Sugden*, Johns 234, *Clifford v Arundell*, 1 De G F & J 307, *Dasbon v Richards*, 14 Sm 537, *Sheppard v Sheppard*, 32 Beav 194

(*k*) *Clifford v Arundell*, *sup*.

(*l*) *Croly v Weld*, 3 De G M & G 993, *Baker v Baker*, 6 H L C 622, *Wright v Callendar*, 2 De G M & G 652

(*m*) *Salvin v Weston*, 35 L J 552, *Ch, Att-Gen v Pouliden*, 3 Ha 555

(*n*) *Graves v Hicks*, 11 Sm 551, *Phillips v Phillips*, 8 Beav 193

(*o*) *Cupri v Jackson*, 13 Pri 721; *McCl* 504

(*p*) *Addcott v Addcott*, 29 Beav 460, *Lambert v Turner*, 8 Jur N S 1223, *Taylor v Taylor*, L R 17 Eq 324 It is to be observed that in the last-cited case the lands were devised subject to and charged with the annuities, a point which does not appear to have been taken into account by Hall, V.-C, and which renders the decision somewhat unsatisfactory See the observations thereon of North, J, in *Re Tucker, Twoler v Tucker*, (1893) 2 Ch 323, and see *inf*, p 412.

(*q*) *Baker v Baker*, 6 H L C 622, questioning *May v Bennett*, 1 Russ. 370, *Michell v Wilton*, L R 20 Eq. 269, *Tarbottom v Earle*, 11 W R. 680.

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the will, the intention appears to be that the capital is to be the fund liable to pay the annuity (i)

Where lands were devised to trustees in trust to receive the rents from time to time, and *thereout* to pay an annuity to A for life, and *immediately* after his decease to convey to other persons in fee; it was held that, upon the death of the annuitant, a new trust arose, and, accordingly, the arrears did not form a charge upon the rents and profits accruing after his death (s)

Cases where the annuity was charged on *corpus*

The *corpus* is charged where the terms are “to levy and raise” the annuity out of the rents and profits (t), and also where, in addition to the direction to pay the annuity out of rents and profits, the estates are “devised subject to,” or “charged with,” or “after full payment and satisfaction of,” or “on trust to pay thereout” (u)

Subject to an annuity

Where an estate was devised in fee, “subject to an annuity,” and the estate was sold for payment of debts, the annuitant was allowed to have recourse to the surplus capital, the income being insufficient (r), and a prospective order has been made for the sale from time to time of so much of the *corpus* as would, together with the income, be necessary for raising the amount of the annuity (y)

Where trustees were directed to take an annuity out of the real estate, and, without prejudice to the annuity and the powers of enforcing the same, to stand possessed of the real estate for others, this was held to be a charge on the fee (z)

When fund set apart

Where a fund is directed to be set apart for payment of the annuity, and the income of the whole estate is insufficient to pay it, and the terms are such as to indicate an intention to charge the *corpus*, the arrears are made good out of *corpus* (a);

(r) *Mills v Druitt*, 20 Beav 632

(s) *Foster v Smith*, 1 Ph 629,

Darbo v Richards, 14 Sim 537

(t) *Playfan v Cooper*, 17 Beav. 187

(u) *Haynes v Haynes*, 3 De G M & G 590, *Giatix v Chambers*, 7 Jur N S 960, *Hickman v Upsall*, 2 Giff 124, *Buch v Sherratt*, L R 2 Ch 644, *Re Mason*, *Mason v Robinson*, 8 Ch D 411, *Re Luesey*, *Baron v Aspdon*, W N (1883) 127

(z) *Stamper v Peckering*, 9 Sim 176, *Exp Wilkinson*, 3 De G. & Sm 633, *Buch v Sherratt*, *sup*, *Miner v. Bell*, 1 Sm. & G 559, *Re J. J.*

Mitchell, 14 Beav 103

(y) *Hodge v Lewin*, 1 Beav 431, *Swallow v Swallow*, *ibid* 432, note

(z) *Miles v Rowland*, W N (1881) 26

(a) *Wright v Callendar*, 2 De G M & G 652, *Ingelman v Worthington*, 25 L J Ch 46, *Perkins v Cooke*, 2 J. & H 393, *Re Mason*, *Mason v Robinson*, 8 Ch D 411, *Illsley v Randall*, W N. (1884) 123 A mortgage by an executor to secure arrears of an annuity belongs to the annuitant See *Depee v. Beaberough*, 10 W R 875

but in such a case, too much weight must not be attached to the words "subject thereto" (b). Similarly, where a fund is set apart by the Court to meet an annuity, and the fund is deficient (c). If a fund is directed to be set apart for an annuity, and there is a gift of the entire residue and the part thereof so set apart, the *corpus* is charged (d).

But if the annuity is given generally, a residuary gift following of "*all the remaining interests of my moneys*" has been held not to prevent the annuity being charged on the *corpus* (e). So, an intention expressed in the will of making up the failure of another fund, on which the annuity was charged, has been held to have the effect of charging the *corpus*, though the annuity was given only out of the dividends with a limitation over (f). So where annuities were charged by the will upon the capital as well as the interest of the moneys to be produced by the sale and conversion of the leasehold and personal estate, and the trustees were directed, if occasion should require, to provide for payment of the annuities out of the rents, issues, and profits of the real estate in aid of the personalty, the annuities being in arrear, it was held, that the arrears were to be raised by sale or mortgage out of the real estate (g).

Where the annuity was directed to be secured out of the leasehold, it was held to be a charge on the *corpus* (h), and when the terms used amount to a charge on the fund, the *corpus* can be resorted to (i).

Where the deficiency is to be made good out of *corpus*, the annuitant is not entitled to have the gross value paid out of capital on the principle of *Wroughton v Colquhoun* (l), but is entitled to have the accruing payments of the annuity made good, if necessary, out of the *corpus*, as in *Wright v Callendar* (l). How the charge of annuity made effectual.

If the annuity is charged on the residue, and an insufficient fund is set apart, the deficiency is still a charge on the rest of the residue (m). Where annuities are expressly charged on

(b) *Mitchell v Wilson*, L R 20 Eq 269. See *Thorner v Wilson*, 28 L J Ch 145; *Ingleman v Worthington*, 25 L J Ch 46, *Re Mason*, 8 Ch. D. 411.

(c) *Commissioners of Charitable Donations v St Lawrence*, 3 J. & L. 561.

(d) *Carmichael v Gee*, 5 App Cas 588.

(e) *Wroughton v Colquhoun*, 1 De G & S 36.

(f) *Boyd v Buchle*, 10 Sim 595.

(g) *Fentiman v Fentiman*, 13 Sim. 171, 16 L J Ch 436.

(h) *Howarth v Rothwell*, 30 Beav 516.

(i) *Hickman v Upsall*, 2 Giff. 124, *Pearson v Holmwell*, L R. 18 Eq 411.

(l) 1 De G & S 357.

(l) 2 De G M & G 652.

(m) *Bright v Larches*, 3 De G & J 148, *Davies v Wether*, 1 S & St 463, *Ilstey v Randall*, W N (1884) 123.

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corpus, a provision for abatement in case the rents are insufficient to pay the annuities in full does not exonerate the *corpus* (n). Whether an annuity is charged on a life estate, or only on the income of the tenant for life as and when actually received, depends on the context of the will (o).

General rule

iv.—Direction to raise Money out of Rents and Profits—Lord Hardwicke, in *Green v. Belcher* (p), said that “in general, where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine it to the receipt of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by a liberal construction of these words, taken them to amount to a direction to sell.”

Charge *primâ facie* created by direction to pay debts out of rents, &c.

A direction in a will to pay debts or legacies out of rents and profits *primâ facie* creates a charge on the *corpus* authorizing money to be raised for payment of the debts by sale or mortgage (q).

Effect of creating a trust to raise money

Where a trust is created for the purpose of raising money out of rents and profits, if the trusts of the will require that a gross sum should at once be raised, the money will be raiseable out of the *corpus* of the estate itself by sale or mortgage (r).

In *Baines v. Dixon* (s), estates were devised to trustees and their heirs upon trust for payment of the testator's funeral expenses, debts, and legacies, as far as his personal estate should be deficient, and for raising maintenance, &c, for his children; and to convey to his eldest son, at twenty-three; and he directed the legacies to be paid after his debts were satisfied, as the rents should advance the same. Lord Hardwicke, on appeal, directed the debts to be raised by sale, and the legacies to be paid out of the annual profits

Where charge is on settled lands

Where a charge is on a settled estate, the Court, in determining whether the charge will be raised by sale or mortgage, will give greater weight to the wishes of the persons whose

(n) *Pearson v. Hollwell*, L R 18 Eq 411

(o) *Mackie v. Mackie*, 5 Ha 70

(p) 1 Atk 506 See also *Gibson v. Rogers*, Amb. 93; *Baines v. Dixon*, 1 Ves. Sen 42, *Lingard v. Earl of Derby*, 1 Bro C C 311, *Allan v. Baekhouse*, Jac. 631.

(q) *Metcalf v. Hutchinson*. 1 Ch D.

591.

(r) *Boote v. Blundell*, 1 Mer 232, *Wilson v. Halliley*, 1 R & M 590, *Lord Lonsborough v. Somerville*, 19 Bea 295, *Metcalf v. Hutchinson*, 1 Ch D. 521, *Balfour v. Cooper*, 23 Ch D 472

(s) 1 Ves. Sen 41 See *Lingard v. Earl of Derby* 1 Bro C C 311

terests in the estate are immediate than to the wishes of the persons whose interests are more remote (t). CHAP. XXIII.

In *Cooke v. Parsons* (u), Lord Nottingham thought that a rection in a will for payment of debts out of the "rents" without saying "profits") was not sufficient whereon to ground sale. And where a trust was created for payment of debts by perception of rents and profits, or by leasing, or by mortgaging" to raise sufficient money for the payment of debts, it as held not to authorize a sale; if there had been a trust of the rents and profits, the term might have been sold (x). It may, apparently, be inferred that if "mortgaging" had not been expressly authorized, the words "perception of the rents and profits" would not have been held to authorize a mortgage also, where money is to be raised "by and out of the rents and profits and by leasing for three lives or twenty-one years," or "out of the rents and profits or by sale of a moiety of the land," or "by rents and other ways and means, except a sale," or generally, where an authority is superadded less extensive than that of selling or mortgaging, the literal meaning of the words will be followed (y).

Again, it was held that a sale was not authorized where a testator, having given the rents of certain lands to his executors in trust therewith to raise and pay his debts, devised all his lands, subject to an annuity, to his sons, directing that they should not enter on the rents until all the debts should be paid (z).

Though the Court will generally, in favour of creditors, consider a devise in trust for payment of debts out of rents and profits to be equivalent to a devise of the estate itself, so as to authorize a sale or mortgage thereof, where the remainderman is tenant in fee or in tail, and therefore liable to pay the debts, yet the case is different where the remainderman is tenant for life only; for then the question arises whether he is to pay the interest of the charge only, or whether he shall also pay the capital. This is strictly a question of intention to be collected from the language of the will with reference to the provisions

Cases where the rule does not apply

Distinction where remainderman is tenant for life

(t) *Metcalf v. Hutchinson*, 1 Ch. D. 591

(u) Prec. Ch. 184. And see *Sir John Talbot v. Duke of Shrewsbury*, Gilb. Rep. Eq. 89

(x) *Radout v. Earl of Plymouth*, 2 Atk. 105

(y) *Ivy v. Gilbert*, 2 P. Wms. 13, *Mills v. Banks*, 3 P. Wms. 1, *Hall v. Carter*, 2 Atk. 358, *Bennett v. Wyndham*, 23 Bea. 521

(z) *Small v. Wing*, 5 Bro. P. C. 66. And see *Harper v. Munday*, 7 De G. M. & G. 369

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contained in it (a). When the direction is alternative, as to raise money by sale or mortgage, or by perception of rents and profits, the meaning of the more general words will not be restricted (b)

Lord St Leonards' Act

v.—Mortgages of Realty by Executors and Trustees under Lord St Leonards' Act.—By the Law of Property Amendment Act, 1859 (c), commonly known as Lord St Leonards' Act, which was passed on the 13th of August, 1859, it is enacted as follows —

Devisee in trust may raise money by sale, notwithstanding want of express power in the will

Sect. 14 “Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his real estate, or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid, by a sale and absolute disposition by public auction, or private contract, of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest, and fix such period or periods of repayment, as the person or persons executing the same shall think proper”

Powers given by last section extended to survivor's devisees, &c

Sect. 15 “The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall, for the time being, be vested by survivorship, descent, or devise, or to any person or persons, who may be appointed under any power in the will or by the Court of Chancery (d) to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid”

Executors to have power of raising money, &c where there is no sufficient devise

Sect. 16 “If any testator, who shall have created such a charge as is described in the fourteenth section, shall not have devised the hereditaments charged as aforesaid, in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said moneys, as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall, for the time being, be vested; but

(a) *Heneage v Lord Andover*, 3 Y & J 260 See also *Wilson v. Hallily*, 1 R. & M. 590, *Playters v Abbot*, 2 My. & K 97

(b) *Greaves v Mattison*, Sir T Jones, 201, *Gerrard v Gerrard*, 2 Vern 458, *Sandys v. Sandys*, 1 P Wms. 707,

Goodall v Rivers, Mosley, 395, *Hebblewhite v Cartwright*, Forr 30, *Hall v Carter*, 2 Atk 355

(c) 22 & 23 Vict c 35

(d) Now the Chancery Division of the High Court

any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate "

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Sect 17 "Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by ss 14, 15, and 16 of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof "

Purchasers, &c not bound to inquire as to powers

Sect 18 "The provisions contained in ss 14, 15, and 16, shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed, and the said several sections shall not extend to a devise to any person or persons in fee, or in tail, or for the testator's whole estate and interest charged with debts, or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage, as he or they may by law now do "

Sects 14, 15, and 16 not to affect certain sales, &c, nor to extend to devises in fee or in tail

Sect 23 "The *bond fide* payment to, and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security "

Receipt for purchase-money, &c to relieve from obligation to see to the application thereof

The effect of the statute may be shortly stated thus :—

Effect of the statute

1. If a testator charges his real estate with debts, and devises all his estate therein to trustees, the trustees can give a title and receipt for the purchase-money (e).

2 The power extends to the trustees for the time being, however appointed (f).

3. If a testator charges his real estate with debts, and does not devise all his estate therein to trustees, the executor can, except in cases falling within s 18, give such title and receipt (g).

4. A mortgagee advancing money to an executor or trustee, where the will contains a charge of debts, &c, on realty, is not, as a general rule, bound to see to the application of the money advanced (h).

Under the old law, prior to Lord St. Leonards' Act, in order to enable the executors of a will to raise money by sale or mortgage of their testator's realty, it must have been given to them, either expressly or by necessary implication, by being made to pass through their hands in the execution of their

When executors could mortgage land under former law

(e) Sect 14
(f) Sect 15

(g) Sect 16
(h) Sect 23

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office, by an express or implied charge for payment of debts or legacies (*i*).

The fact of there being a charge of debts on real estate devised to trustees did not enlarge their estate into a fee simple, so as to enable them to sell (*h*). But where the trustees were also executors, they were held to have the legal estate in fee, with power to sell for payment of debts (*l*). It is also clear that a charge of debts enabled the trustees and the executor together to sell or mortgage (*m*). And these cases were considered to involve the decision that it was the executor who was to sell, and not the devisee (*n*).

Where there was a charge of debts on real estate, which was devised to one for life, with contingent remainders over, a power of sale in the executor was implied (*o*).

The whole doctrine was founded upon the principle of carrying out most conveniently the intention of the testator. A charge of debts implies a power of sale or mortgage in someone, and the donee of the power is to be ascertained from the whole will (*p*).

Effect of Lord
St Leonards'
Act where
there is a
devise to
trustees

Where there is a charge of debts or legacies express or implied, by sects. 14 and 15 of Lord St Leonards' Act, if the will devises the testator's realty to trustees, then, in the absence of contrary intention expressed by the will, the trustees for the time being of the will have power to sell or mortgage the realty for payment of debts or legacies. Where, upon the construction of a will, it seemed doubtful whether the testator intended to vest his realty in his trustees, or to make them mere releases to the use of the beneficiaries, it was held that a direction to pay debts was sufficient to show that the intention was to devise the realty to the trustees in fee in trust for the beneficiaries (*q*).

Where the widow of a deceased partner, who was sole trustee and executrix of his will, concurred with the surviving partner

(*i*) *Benham v. Wiltshire*, 4 Madd 44. See *Curtis v. Fullbrook*, 8 Ha 25, 278, *Haydon v. Wood*, 8 Ha 279. See *Pitt v. Pelham*, 1 Ch Ca 176, *Patton v. Randall*, 1 J & W 189, *Carvill v. Carvill*, 2 Rep in Ch 301.

(*h*) *Kemich v. Lord Beauchamp*, 3 B & P 175, *Doe v. Ewart*, 7 A & E 636, 668; *Dean v. Mellor*, 5 T R 558.

(*l*) *Creton v. Creton*, 3 Sm & G 286, *Spence v. Spence*, 12 C B N S 199; *Marshall v. Giggell*, 21 Ch D. 790.

(*m*) *Shaw v. Borer*, 1 Keen, 559, *Ball v. Harris*, 8 Sm 485, 4 My & Cr 264. See *Re Jones, Dutton v. Brookfield*, W N (1889) 176.

(*n*) *Gosling v. Carter*, 1 Coll 644, 649, 652.

(*o*) *Robinson v. Lowater*, 5 De G M & G 272.

(*p*) *Endsforth v. Armistead*, 2 K. & J 333.

(*q*) *Re Brooke, Brooke v. Brooke*, (1894) 1 Ch 43. See also *Hawkins on* 17-11, 153, 150.

in selling real estate forming part of the partnership property, it was held that, as executrix, she had power to sell and give an effectual receipt for the purchase-money, and as trustee, to convey the legal estate (r).

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Where the real estate is not devised in trust, sect. 16, by giving to the executors the same power of raising money as is, by sects 14, 15, given to devisees in trust, appears clearly to empower the executors raising money to convey to a mortgagee, the legal estate in the mortgaged lands. Prior to the statute, some doubts were expressed on this point (s), but the better opinion would seem to be that, under a general charge of debts, the executors had such a power (t).

Effect where there is no devise in trust.

Independently of the statute, an administrator with the will annexed was never deemed to have an implied power to sell or mortgage the testator's realty by virtue of a charge of debts; and the expression in sect 16, "persons in whom the executorship is for the time being vested," has been held not to include an administrator (u).

Whether administrator may mortgage land

Where real estate is devised, charged with debts, to a person who is not a trustee or executor, the effect of sect 18 of the Act is to prevent the statutory power of the executor to dispose of and convey the property from extending to such a case, and to leave the question as to the power of the devisee to sell or mortgage free from debts and legacies to be determined by the law as it exists irrespective of the statute. This question does not appear free from doubt.

Effect of devise of land charged with debts to person not executor or trustee

Where there is a devise of the legal estate to a particular person, and the estate is charged with the payment of debts and legacies, it is clear that the money cannot be raised except through the instrumentality of the devisee who is the only person who can make a legal title (x).

It has also been held that, though the statute 3 & 4 Will IV c 104, makes real estate "assets to be administered in Courts of Equity" for payment of debts of the deceased, the statute does not make the debts, before decree of administration, such a charge on the land as to render a *bonâ fide* purchaser or mortgagee from the devisee liable to see to the application of the

(r) *West of England, &c Bank v Murch*, 23 Ch D 138

(s) See *Goaling v Carter*, 1 Coll 614, *Blatch v Wilden*, 1 Atk 420

(t) *Collyer v Finch*, 7 H L C 905, at p. 922 See *Briggs v Sharp*, L R

20 Eq 317, 320

(u) *Re Clay and Tiley*, 16 Ch D 3, C A See also *Sug Powers*, 111,

Farwell, Powers, 88, 96; and *Shep Touchst* by *Preston*, 417 a, note (p)

(v) *Collyer v Finch*, 5 H L C 905.

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money (y). And in *Corser v Cartwright* (z) the Court of Appeal laid it down as a general rule that the effect of a devise of real estate charged with debts or legacies is altogether to supersede any implied power which such a charge would otherwise give to the executors to sell or mortgage the real estate; but, on appeal to the House of Lords (a), all the learned lords pointed out that, in the case before them, the devisee was also an executor of the will, and, though the decision of the Court of Appeal was affirmed on that ground, Lord Cairns, C, expressly disclaimed giving any opinion as to the case of a person who is not an executor being devisee of an estate charged with payment of debts.

It is, therefore, apprehended that an intending mortgagee dealing with a devisee of real estate charged with debts or legacies, should either require the concurrence of the executor or should be careful to ascertain that the money is required for payment of the debts or legacies, and that it is applied for that purpose. If it is alleged that all debts and legacies have been paid, the mortgagee, before treating the borrower as an ordinary devisee, should satisfy himself that this is the case by such evidence as the case admits of (b).

Exception of
devisees in fee
or in tail

The exception laid down in the concluding clause of sect. 18 does not apply where an estate is devised by way of settlement charged with debts or legacies, so that there is no individual or individuals who are able to make a good title to a mortgagee; in such a case, the executors have power to make a valid mortgage under sect 16 of the Act (c).

Receipt of
executor or
trustee for
moneys
advanced

The provision of sect 23 of Lord St. Leonards' Act that a receipt of trustees or executors shall relieve purchasers and mortgagees from the obligation to see to the application of moneys paid, is still in force, but has been virtually superseded by sect. 20 of the Trustee Act, 1893 (d), which enacts as follows:—

Power of

“(1.) The receipt in writing of any trustee for any money, secu-

(y) *Kinderley v Jervis*, 22 Beav 1
See *Spackman v Timbrell*, 8 Sim 260,
Ball v. Harris, 2 My & Cr. 264, 268,
Richardson v Horton, 7 Beav. 112,
Penn v Insall, 1 Mac & G. 449

(z) L R. 8 Ch App 971.

(a) S C, 7 H L 731, 737

(b) It must be borne in mind that there can be no specific enforcement of an agreement to advance money, so

that an intending mortgagee, unlike a purchaser, may make any requisitions he thinks fit, and is not bound to complete the transaction unless such requisitions are answered to his entire satisfaction

(c) *Re Wilson, Pennington v Payne*, 34 W R 512

(d) 56 & 57 Vict c. 53, s 20

rities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof

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trustees to
give receipts

“(2) This section applies to trusts created either before or after the commencement of this Act ”

It has been seen that fraud or collusion on the part of the mortgagee, or the fact that he has actual or constructive notice of any impropriety attending the transaction, will deprive him of the statutory protection against liability to see to the application of the money advanced. On this principle, if an estate is devised subject to debts and legacies, a mortgagee advancing money to the devisee, although also the executor, is liable to the charge if the circumstances of the case afford intrinsic evidence, or it otherwise appear, that the mortgage money is not to be applied in payment of debts and legacies, but for the private purposes of the mortgagor (e).

Fraud or
collusion

It was held, under the former law, that if estates were devised charged with specific sums to the executors for payment of debts, a mortgagee was bound to see to the application of the mortgage money, notwithstanding releases had been executed to the devisees by the executors, but which did not show the charges to have been raised or paid (f). But the statutory power of trustees or executors now extends to sums payable to them, so as to exonerate the person paying the money from the liability.

Specific sums
for debts

In several cases decided before the Act (g), it was held that the implied power to sell by virtue of a charge of debts, exonerated a purchaser or mortgagee from inquiry as to whether the debts had been paid notwithstanding a very considerable lapse of time since the testator's death. It was, however, laid down by the Court of Appeal that after a lapse of twenty years, which is sufficient to bar mortgage debts and all other specialty debts, there is a presumption that the debts are paid; so that, after the twenty years have elapsed, a purchaser or mortgagee is bound to inquire whether the debts are paid; or, otherwise,

Whether
mortgagee is
bound to in-
quire whether
debts, &c are
paid

(e) *Walker v Taylor*, 8 Jur N S 681, H L, *Corser v Cartwright*, L R 7 H L 726, *West of England Bank v Munch*, 23 Ch D 138

(f) *Brathwaite v Britain*, 1 Kee.

206 See *Horn v Hoin*, 2 S & St 448

(g) *Forbes v Peacock*, 12 Sim 528 (25 years), *Sabine v Heape*, 27 Beav 553 (27 years), *Wrigley v Sykes*, 21 Beav 337 (33 years)

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he will be liable if the money is applied improperly for other purposes; but within that period he is not bound or entitled so to inquire (*h*)

Distinction
in regard to
leaseholds

The rule, however, applies only to sales of realty, the right of an executor to dispose of which depends solely on a power implied by a charge of debts, &c, and does not apply to leaseholds which are vested in the executor in his character as such, giving him complete power to deal. An executor dealing with leaseholds or other personalty of his testator must, therefore, in the absence of evidence to the contrary, be presumed to have acted in the discharge of his duties as executor, and a purchaser or mortgagee is not bound or entitled, notwithstanding any lapse of time, to inquire whether the debts, &c, have been paid (*i*)

Charge of
debts and
legacies

It is settled that a general charge of debts and legacies, including annuities, on real estate, renders a purchaser or mortgagee from the devisee-executor safe from seeing to the application of the purchase or mortgage money so long as any part of the trust is unperformed, although the purchaser or mortgagee is aware that all the debts have been paid; the rule depending on the state of things at the testator's death, and being unaffected by a subsequent change of circumstances (*j*).

—◆—

SECTION III.

OF STATUTORY POWERS OF TRUSTEES TO RAISE MONEY FOR SPECIAL PURPOSES

Power to raise
money for
exchange, &c

i.—Mortgages of Settled Property.—By sect 9 of Lord Cranworth's Act (*h*), trustees of settled lands were empowered to raise money for equality of exchange, and for renewals of leases for lives or for years, by mortgage of the hereditaments received in exchange or contained in the renewed lease (as the case might be), or of any hereditaments subject to the subsisting uses or trusts of the settlement, and to convey the hereditaments to be comprised in the security accordingly.

This enactment is now repealed by the Settled Land Act, 1882 (*i*), with a saving of rights accrued, or obligations incurred, and the validity and operation of instruments previously made

(*h*) *Re Tanqueray-Willaume and Landau*, 20 Ch D 465, 480, C A

(*i*) *Re Whistler*, 35 Ch D 561 See *Re Venn and Furne's Contract*, (1894) 2 Ch. 101.

(*j*) *Eland v Eland*, 4 My & Cr 420, *Page v Adam*, 4 Beav 269, *Storey v Walsh*, 18 Beav 559

(*k*) 23 & 24 Vict c 145, s. 9

(*l*) 45 & 46 Vict c 38, s 64, and Sched

The repealed enactment, therefore, applies only to exchanges and renewals made between the 28th August, 1860, and the 31st December, 1882. CHAP XXIII.

Powers of raising money for equality of exchange and other purposes are now given to tenants for life and other limited owners of settled lands, and to the trustees of the settlement, where the owners are infants, by the Settled Land Acts, 1882 and 1890 (*m*).

As regards the renewal of leases, there was no statutory power to raise money for that purpose from the year 1882 until the 24th December, 1888, when the Trustee Act, 1888 (*n*), came into operation. By sect 11 of that Act, which applied to trusts created as well before as after the passing thereof, the provisions of the repealed enactment contained in Lord Ciamworth's Act are virtually re-enacted. Renewal of leases

Sect 11 of the Trustee Act, 1888, has been in its turn repealed by the Trustee Act, 1893 (*o*), but re-enacted in similar terms.

It is to be observed that neither the repealed section nor the enactment now in force contains any power for the trustees raising money for renewals to convey or assure the hereditaments intended to be comprised in the security, so that it would seem that the only security they can give is by way of equitable charge upon the lands (*p*).

The effect of the above statutory enactments is merely to facilitate the renewal of leases of lands comprised in settlements, and not to alter any rule of law as between tenant for life and remainderman, with respect to the ultimate incidence of the expenses of renewal (*q*).

By the statute 57 & 58 Vict. c 30, sect 9, sub-sect (5), executors and trustees, being accountable for estate duty, may for the purpose of paying the duty, or recouping themselves the amount of duty already paid by them, raise the amount of such duty and any interest and incidental expenses by sale or mortgage of the property to which the duty has attached. Payment of estate duty

ii.—Mortgages under the Charitable Trusts Acts.—The 16 & 17 Vict. c. 137, constituting the Charity Commission, The Charitable Trusts Act, 1853.

(*m*) *Ibid*, ss 18, 58, 59, 60, 53 & 54
Vict c 69, s 11

(*n*) 51 & 52 Vict c 59

(*o*) 56 & 57 Vict c 53, ss. 19, 51

(*p*) *Re Baring, Jeune v. Baring*,
(1893) 1 Ch 61

(*q*) *Ibid* See also *Nightingale v. Lawson*, 1 Bro. C C 440

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Mortgage
of charity
estates for
improvement

empowered the commissioners sitting as a board (s. 21) to authorize money to be raised by mortgage of charity estates for purposes of improvement, provided that compulsory provisions were reserved in every such mortgage for payment of the principal money borrowed by annual instalments, and for redemption and reconveyance within thirty years

The Charitable Trusts
Amendment
Act, 1855

Under 18 & 19 Vict c 124, s 30, in lieu of such compulsory provisions being inserted in the mortgage, the board authorizing any mortgage is to give directions by its order for discharge of the principal debt, or any part thereof, by instalments, within thirty years, or for forming a sinking fund for discharge of the principal debt, or any part thereof, within the same period

Powers of
trustees only
under Act

By sect 29 of the same Act, the trustees or administrators of any charity are disabled from selling or mortgaging the charity estate otherwise than under an Act of Parliament or a Court of competent jurisdiction, or according to a scheme legally established (q), or with the approval of the board

The Charity
Act of 1860

By 23 & 24 Vict c 136, s 15, the power contained in s 21 of the Act of 1853, is extended so as to authorize the application of moneys raised on the securities of the properties of the charity, to any purpose or object which the board shall consider to be beneficial to the charity or the estate or objects thereof, and which shall not be inconsistent with the trusts or intentions of the foundation

Power of
majority of
trustees

By sect 12 of the Act of 1869 (r), a majority of the trustees are empowered to execute all assurances, &c, requisite for carrying any mortgage into effect, on behalf of themselves and of their co-trustees, and also of the official trustee, in cases where his concurrence would otherwise be required (r).

SECTION IV.

OF MORTGAGES BY TRUSTEES UNDER EXPRESS POWERS.

When express
powers are
required.

i.—Of Powers of Mortgaging in Settlements and Wills.—

Express powers authorizing trustees to raise money for purposes connected with their trusts were formerly often inserted in settlements and wills, and are required at the present day if it

(q) See *Re Mason's Orphanage*, (1896)

1 Ch 596, C A

(r) 32 & 33 Vict c 110 A majority of two-thirds of the trustees was formerly necessary See 23 & 24 Vict

c 136, s 16 (repealed)

(r) As to when the concurrence of the official trustee is required, see 16 & 17 Vict c 137, ss 47—50, and 18 & 19 Vict c 124 s 30

is desired that money should be raised for purposes other than those of enfranchisement, exchange, or partition, or of discharge of incumbrances affecting settled lands (s), or of renewal of leases (t)

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Where trustees have a discretionary power to sell or mortgage settled property, the Court will not enforce the exercise of the power, however beneficial its exercise may be (u)

Discretion of trustees.

If there be a devise in trust, by mortgage or sale, to raise money for payment of debts, the trustees may proceed to raise the money without the sanction of a decree; for decrees do not give rights, but are only executions of the trust or power already subsisting (x)

If the power to mortgage is for payment of debts on a deficiency of personalty, there can be no mortgage after a decree proving that all debts are paid (y).

A power or trust to raise money by mortgage may be created by informal words (z). Estates are sometimes vested in trustees upon trust or with power to sell, without any express power to mortgage. It has been held that mortgage is *pro tanto* a sale, and that therefore a trust or power for sale will, generally speaking, include a mortgage (a); but the authority to mortgage must depend upon the nature of the trust. If the object of the trust is for a definite purpose, such as to raise a certain sum of money for debts, portions, and the like, without an ulterior intention of effecting an entire conversion into personalty by an absolute sale, there seems no objection to the money being in every case, where practicable, raised by mortgage. Questions of this sort must depend on the peculiar circumstances of the trust, and the intention of the parties as shown on the instrument.

What will amount to power of mortgaging

A mortgage, however, would not be authorized under a trust for conversion out and out (b); or where an intention appears that a complete conversion by sale should be effected (c).

Contrary intention

(s) As to the statutory powers of limited owners to raise money for enfranchisement, &c, see 45 & 46 Vict c 38, s 18, and 53 & 54 Vict c 69, s 11, *ante*, p 385

(t) *Supra*, p 423

(u) *Camden v Murray*, 16 Ch D 161, *Tempest v Lord Camoy*, 21 Ch D 571, C A

(x) *Earl of Bath v Earl of Bradford*, 2 Ves Sen 586. And see *Jones v Price*, 11 Sim. 557.

(y) *Carlyon v Truscott*, L R 20 Eq 348

(z) *Denysen v. Bothey*, 8 W R 710

(a) *Mills v Banks*, 3 P. Wms 9, *Earl of Orford v Lord Albemarle*, 17 L J Ch 396. See *Ball v Harris*, 4 My & Cr 276

(b) *Stronghill v Anstey*, 1 De G M. & G 635, *Page v Cooper*, 16 Beav 396

(c) *Holdenby v Spofforth*, 1 Beav. 390.

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Where land is directed to be sold by trustees, they have only a power, but no estate (*d*)

A power given by will to the executors and trustees thereof to wind up the testator's affairs, &c, and in so doing to make any "sales or other arrangements" as they should think fit, was held to empower the trustees to raise money by mortgage of the testator's real estate (*e*)

Where a testator devised and bequeathed all his property to trustees and directed them to carry on his business, and empowered them to increase or abridge the business and the capital thereof, it was held that, inasmuch as the trustees had power to sell the realty and use the proceeds so as to increase the business, they had power to mortgage the realty for that purpose (*f*).

Whether
power to
mortgage
authorizes a
sale

Conversely, a sale is not, generally speaking, authorized by a power to raise money by mortgage (*g*) But where a tenant for life under a settlement had a general power to charge the estate to any amount, and by his will he directed the estate to be sold, a sale was decreed pursuant to this direction (*h*). And a power to raise money "by mortgage or otherwise" will authorize a sale (*i*) It is doubtful whether, under a trust to raise money by sale or mortgage, trustees can make a sale after having raised the money required by mortgage; at all events, the mortgagee cannot compel the trustees to sell (*j*)

Power to
"raise"
money

A power to "raise" a sum of money has been held to authorize a sale, and could apparently enable the donee of the power also to mortgage (*k*).

Power to
charge.

A general power to charge will authorize an appointment of the fee to secure the money raised (*l*); but it would seem that a particular power of charging does not enable the donee of the power to appoint the fee by way of mortgage, but only enables him to create an equitable charge (*m*).

General power
of appoint-
ment

Conversely, a power to appoint the fee will authorize a charge which the Court will, as a general rule, carry into effect by a

(*d*) *Elliott v Fisher*, 12 Sim 505, *Thompson v Todd*, 15 Ir Ch R 337

(*e*) *Re Jones, Dutton v Brookfield*, W. N (1889) 178.

(*f*) *Re Dimmock, Dimmock v Dimmock*, 52 L. T. 494. See *Redman v Rymers*, 65 L. T. 270

(*g*) *Rudout v. Earl of Plymouth*, 2 Atk. 104

(*h*) *Long v. Long*, 5 Ves. 445.

(*i*) *Tuscher v Small*, 6 Sim 625, affd on other points, 3 My & Cr 63

(*j*) *Fall v Lord Clinton*, 12 Ves 56

(*k*) *Wareham v Brown*, 2 Vern 153, *Bateman v Bateman*, 1 Atk 421

(*l*) *Long v Long*, 5 Ves 445, *Bateman v Bateman, sup*, *Drake v. Whitmore*, 5 De G & S 619

(*m*) *Jenkins v Keyms*, 1 Ch Ca 103

sale (*n*). In such a case, the Court may authorize an appointment to trustees in trust for sale (*o*).

In one case, a power to charge with a sum of money was held to authorize the grant of a rent-charge, until the principal and interest were paid (*p*); but the case was a very special one

Upon the general principle elsewhere referred to (*q*), that a direction to raise money out of rents and profits for a purpose which requires a gross sum to be raised at once, will charge the *corpus* of the estate, fines for the renewal of leases for lives and upon taking admittance to copyholds, may be raised (*r*) out of the estate itself, although the rents and profits be the only specified fund. Where there is a power to raise fines out of annual rents and profits, with power to mortgage in case the necessary sums shall not be provided in that manner, the fines will be payable out of the income if it be sufficient (*s*). But where the power is simply to raise the fines out of the rents or by mortgage, if the trustees refuse to exercise their discretion as to the mode of raising the money, the Court, in pursuance of its general principles, will so raise it as to throw the burden upon the parties in proportion to their interests in the property charged; although it seems the trustees, in the exercise of their power, might have made a different disposition (*t*).

Fines for renewal, when raiseable out of rents, &c

It has been seen that the receipt of trustees for moneys advanced to them will generally exonerate the mortgagee from seeing to the application of the money (*u*); but fraud or collusion on his part, enabling the trustees to apply the money to their own purposes, will vitiate the mortgage (*x*).

Trustees receipts

A power to charge an estate with a specific sum of money without mentioning interest, includes a power to charge with interest (*y*); and the interest may be at any rate fixed by the donee of the power, who is not limited to the rate of interest allowed by the Court (*z*). But this rule does not apply where the trustees have not a discretionary power to charge, but an

Interest.

(*n*) *Roberts v Draxall*, 2 Eq Ca Ab 668. And see *Palmer v Wheeler*, 2 Ba & Be 18, *Shelton v Flanagan*, Ir R 1 Eq 362.

(*o*) *Kenworthy v Bate*, 6 Ves 793.

(*p*) *Blake v Marnell*, 2 Ba & Be 35.

(*q*) *Ante*, p 414.

(*r*) *Allan v Backhouse*, 2 V & B 65, *Playfers v Abbott*, 2 My & K 97, *Garmstone v Gaunt*, 9 Jur 78.

(*s*) *Solley v Wood*, 29 Beav 482.

(*t*) *Jones v Jones*, 5 Ha 440, *Amslie v Hancock*, 28 Beav 313.

(*u*) 22 & 23 Vict c 35, s 23, 56 & 57 Vict c 53, s 20, *ante*, p 401.

(*x*) *Burt v Truman*, 6 Jur N S 721.

(*y*) *Kilmurry v Geery*, 2 Salk 538, *Boycot v Cotton*, 1 Atk 556, *Evelyn v Evelyn*, 2 P Wms 659, *Hall v Carter*, 3 Atk 359, *Lewis v Freke*, 2 Ves jun 507.

(*z*) *Lewis v Freke*, *sup*.

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imperative trust to raise a sum of money for specific purposes ; in such a case, the interest must not exceed the rate of 4 per cent , or, in the case of Irish estates, of 5 per cent. (*p*).

Costs.

Where trustees have power to raise a sum of money, they have power also to raise the costs of the mortgage (*q*).

Where real estate subject to several incumbrances was conveyed to trustees in trust to raise 75,000*l* to pay off the incumbrances prior to a mortgage to A, who paid off and took transfers of the prior incumbrances; the trustees then, by a deed to which the mortgagor was a party, purported to assign to A. the 75,000*l* raiseable under the trust deed, and to convey to him the property by way of mortgage to secure 75,000*l* and interest; it was held that this was not a mortgage under the trust, and that, as against mesne incumbrancers, A. could only stand as a transferee of the incumbrances transferred to the extent of the security thereby created (*r*).

Covenant to pay.

ii.—Form of Mortgage by Trustees.—A covenant to pay in a mortgage by trustees is unusual (*s*); and where a covenant was entered into by a trustee-mortgagor, an action on such covenant was, under circumstances of fraud, restrained (*t*).

Power of sale

It may now be considered settled that a power to trustees or others to mortgage authorizes a mortgage with power of sale (*u*), in opposition to former authorities (*x*) It is safer, however, that trustees to whom power to mortgage is given, should be authorized in terms to give a power of sale (*y*)

Where money is directed by the Court to be raised by mortgage, a power of sale has been sometimes inserted (*z*), and sometimes refused (*a*). The plan has sometimes been to give a power of sale with a proviso that it shall not be exercised during the infancy or other disability of the persons entitled subject to the mortgage, without the leave of the Court (*b*).

(*p*) *Balfour v Cooper*, 23 Ch D 473, C A, distinguishing *Young v Lord Waterpark*, 13 Sim 190

(*q*) *Armstrong v Armstrong*, L R 18 Eq 541 See *Steuil v Bishopp*, 62 L J Ch 985, C A.

(*r*) *Thompson v Hudson*, L R 2 Ch A 255, reversed on other grounds, L R 4 H L 2.

(*s*) See *Stronghill v Anstey*, 1 De G M & G. 635, at p 642

(*t*) *Greenfield v Edwards*, 2 De G. J & S, 582

(*u*) *Basley v Abraham*, 14 L T 219, Q B, *Bridges v Longman*, 24 Beav

27, *Cool v Dawson*, 29 Beav 128, *Re Chauner's Will*, L R 8 Eq 569.

See *Bennett v Wyndham*, 4 De G F & J 259, *Russell v Place*, 18 Beav 21,

Cruikshank v Duffin, L R 13 Eq 555 (*x*) *Clarke v The Royal Panopticon*, 4 Drew 26, *Sanders v Richards*, 2 Coll 568

(*y*) Dav Con (4th ed) vol II pt 2, p 85

(*z*) *Selby v Cooling*, 23 Beav 418

(*a*) *Drake v Whitmore*, 19 L T 243

(*b*) 2 Dav. Conv. 3rd ed p. 635, 4th ed p 86.

SECTION V.

CHAP XXIII

OF MORTGAGES UNDER TRUST TERMS FOR PORTIONS AND
MAINTENANCE

i.—At what Time Portions are raiseable.—In modern settlements and wills where portions are intended to be provided, the trustees are usually empowered, after the deaths of the tenants for life, or in their lifetime if they shall direct, to raise any part of the portions for the advancement of the children, and, after the deaths of the tenants for life and until the portions are payable, to raise certain sums for maintenance, not exceeding the amount of interest on the principal of the portion, with a proviso that the trustees shall not mortgage or sell until some one of the portions becomes payable.

Powers to raise portions by mortgage, &c

The general rule is, that when portions are by will or settlement vested, and directed to be paid at a given time, and raised by sale or mortgage of a term, they shall be raiseable at such time out of the term, though reversionary, unless an intention is shown on the will or settlement that the payment shall be postponed until the term comes into possession (c). The portions are thus raiseable in the parents' lifetime, though the term is not to commence till after their death, or their death without issue male (as the case may be). If all the contingencies have happened, the portions must be raised, notwithstanding the injury to the remainderman by the sale or mortgage of the term (d); *secus*, if all the contingencies have not happened (e).

General rule

A contrary intention has been considered to be shown by a direction to raise the portions "after the commencement of the term" (f), or where maintenance is directed to be raised out of the rents and profits after the term has fallen into possession (g), it being conceived to be inconsistent to raise the portions before, and the maintenance after, the commencement of the term (h); but the apparent inconsistency of such direction as to main-

Contrary intention

(c) *Heyter v Jones*, 3 Rep in Ch 106, *S C*, 1 Eq Ca Abr 357, *sub nom Helles v Jones*, *Greaves v Matheson*, Sir T Jones, 201, *Stamforth v Stamford*, 2 Vern 460, *Sandys v Sandys*, 1 P Wms 707, *Goodall v Mose* 395, *Michell v Michell*, 4 Bear 581, *Cartwright v Smith v Evans*, Amb 633, *Way v Conway*, 3 Bro C C 267, *exd in Codrington v Lord Foley*, 6 Ves, at

pp 379, 330

(d) *Hebblethwaite v Cartwright*, Forr 30, *Codrington v Lord Foley*, 6 Ves 363

(e) *Corbett v Mandwell*, 1 Salk 158, 3 Rep in Ch 101

(f) *Butler v Duncomb*, 1 P Wms 448, *Churchman v Harvey*, Amb 335

(g) *Brome v Berkeley*, 2 P Wms 484, *Stevens v Dethick*, 3 Atk 39

(h) *Brome v Berkeley sup*

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tenance does not prevent the operation of the rule in the face of a clear and express declaration (i).

A contrary intention has also been considered to be shown by an option to the trustees to raise the portions either out of the rents and profits, or by sale or mortgage of the term; but the better opinion is, that the exercise of the option by the trustees shall not be allowed to prejudice the right to the immediate raising of the portions (j). The circumstance also of the settlement providing that the children should out of the premises receive a yearly sum for maintenance, and that the residue of the rents should in the meantime, until the portions became payable, be received by the persons entitled to the reversion immediately expectant on the term, has been thought a sufficient indication of the intention to take the case out of the general rule (k). So, where there was a proviso in the settlement, making the portion contingent during the father's lifetime, and the father had a power of revocation (l). If a parent, who is tenant for life, with remainder to trustees, of a term for raising portions, has a power of appointing the portions, they cannot be raised in the parent's lifetime (m).

Inconveni-
ences from
rule

The inconveniences urged as arising from the rule, were these: if the portions were ordered to be raised by *sale* of the reversionary term, the interests of the remainderman or reversioner might, in case the property was not of great value, be totally sacrificed to the raising of the portions; and even if the property was considerable, still the injury done to the estate might be very serious. If the portions were ordered to be raised by *mortgage* of the reversionary term, then the estate of the tenant for life must be encroached upon to satisfy the accruing interest of the mortgage, contrary to the intent, and in many cases, the express wording, of the settlement, or the only alternative was that the interest should run in arrear; and as in such latter case the mortgagee might, under the old practice (n), have brought his action, and, by procuring rests to be taken, might have converted interest into principal, it was clear that, if the tenant for life lived many years, the interest might have doubled or even trebled the principal, and by such means have proved the total ruin of the estate.

(i) *Lyon v. Chandos*, 3 Atk 416

(j) *Hebblethwaite v. Cartwright*, Forr. 30, *Hall v. Carter*, 2 Atk 355.

(k) *Stevens v. Delhack*, 3 Atk 39; *Smyth v. Foley*, 3 Y. & C Ex 142. But

see *Michell v. Michell*, 4 Beav 424, 18.

(l) *Reynolds v. Reynolds*, 19 L. T 243

(m) 2 Dav. Conv. 3rd ed. p. 635,

(n) 2d p. 86.

at p

These inconveniences so weighed with some judges, that trifling circumstances have been seized hold of in order to escape from its operation (o).

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This view was, however, disapproved of by Lord Eldon (p), who said, "The rule upon the whole depends upon this, whether it was the intention of the parties to the instrument, attending to the whole of it, that the portion should or should not be raised in this manner. Taking it *prima facie* to be the intention upon the general rule, if there is nothing more than a limitation to the parent for life with a term to raise portions at the age of twenty-one or marriage, and the interests are vested, and the contingencies have happened at which the portions are to be paid, the interest is payable and the portions must be raised in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term" (q).

The rule laid down by Lord Eldon has since been followed in *Smyth v. Foley* (r), and is thoroughly established.

Under a trust for raising portions and maintenance, the Court will not direct maintenance to be raised on the portion of a child of a first marriage during the life of a second wife, although she takes no estate, if the words of the trust are clearly opposed to it (s).

Maintenance for children of first marriage

Portions carry interest, though not mentioned, as from the time when they ought to be raised and paid (t), but not before that time (u). Accordingly, if a portion is directed to be raised out of rents and profits, and no time is appointed for raising the portion, only the bare sum required, without interest, must be raised, and any mortgage of the trust term for the purpose of raising the mortgage will be void (x).

Interest

Trustees empowered to raise money for portions have an implied power to raise the incidental costs of a mortgage (y).

Costs

As to raising all the portions as soon as one becomes payable,

(o) *Stanley v. Stanley*, 1 Atk 549, *Clinton v. Lord Seymour*, 4 Ves 440

(p) *Codrington v. Lord Foley*, 6 Ves 363

(q) *Hobblethwaite v. Cartwright*, For 30

(r) 3 Y & C Ex 142 And see *Cotton v. Cotton*, 3 Y & C Ex 149, n., and *Andrews*, 1 Coll 59

Rivers, 2 Atk 217, *Beav* 549, *Jell*, 2 Cart, 2174.

Smith v. Evans, Amb 633, *ust*.

Conway, 3 Bro C C 267, *ex* 59, *Codrington v. Lord Foley*, 6 Ves 363 d

Windsor, 2 Ves Sen 472, at p 487, *Daly v. French*, 6 B P C by Toml 55, *Codrington v. Lord Foley*, 6 Ves 364 See *Hall v. Carter*, 2 Atk 355, at p 358

(u) *Churchman v. Harvey*, Amb 335, at p 342; *Reynolds v. Meyrick*, 1 Ed 48

(x) *Ivy v. Gilbert*, 2 P Wms. 13 See *Green v. Belcher*, 1 Atk 505

(y) *Michell v. Michell*, 4 Beav 495, *Armstrong v. Armstrong*, L. R. 18 Eq 541.

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tenance does not prevent the operation of the rule in the face of a clear and express declaration (e).

A contrary intention has also been considered to be shown by an option to the trustees to raise the portions either out of the rents and profits, or by sale or mortgage of the term; but the better opinion is, that the exercise of the option by the trustees shall not be allowed to prejudice the right to the immediate raising of the portions (f). The circumstance also of the settlement providing that the children should out of the premises receive a yearly sum for maintenance, and that the residue of the rents should in the meantime, until the portions became payable, be received by the persons entitled to the reversion immediately expectant on the term, has been thought a sufficient indication of the intention to take the case out of the general rule (h). So, where there was a proviso in the settlement, making the portion contingent during the father's lifetime, and the father had a power of revocation (i). If a parent, who is tenant for life, with remainder to trustees, of a term for raising portions, has a power of appointing the portions, they cannot be raised in the parent's lifetime (m).

Inconveniences from rule

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(e) *Lyon v. Chandos*, 3 Atk 416
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(h) *Stevens v. Dethick*, 3 Atk 39,
Smyth v. Foley, 3 Y. & C Ex. 142. But

see *Mitchell v. Mitchell*, 4 Beav 40
(i) *Reveries v. Bland*, 25 94.
(m) *N. Bold*, 1 S & St 507
(n) *Cotton v. Chadock*, 1 Keen,

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(q) *Hebblethwaite v Cartwright*, For. 30

(r) 3 Y & C Ex 142 And see *Cotton v. Cotton*, 3 Y & C Ex 149, n, and *Gough v Andrews*, 1 Coll 59

(s) *Hume v Rundell*, 2 S & St 174. But *quære*, the construction of the trust.

(t) *Erelyn v Evelyn*, 2 P Wms 659, at p 669, *Earl of Pomfret v Lord*

Windsor, 2 Ves Sen 472, at p 487, *Daly v French*, 6 B P O by Toml 55, *Codrington v Lord Foley*, 6 Ves 364 See *Hall v Carter*, 2 Atk. 355, at p 358

(u) *Churchman v Harvey*, Amb 335, at p 342; *Reynolds v Meyrick*, 1 Ed 48

(x) *Ivy v Gilbert*, 2 P Wms 13. See *Green v Belcher*, 1 Atk 505

(y) *Michell v. Michell*, 4 Beav 495, *Armstrong v. Armstrong*, L R. 18 Eq 541.

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see *Gillibrand v Goold* (z). In the exercise of a discretion on this point, the trustees should consider, on the one hand, how far the loss by infant portionists of the security of the term until their portions are raised is an objection to raising the entire sum at once (a); and, on the other hand, that the raising of each portion as it becomes payable by a separate mortgage may cause considerable expense to the estate (b).

ii.—**Methods of raising Money**—If a settlement or will contains a charge of portions, without specifying in what manner the money required is to be raised, a mortgage may be made for that purpose under the direction of the Court, as in the case of any other charge (c); but where the trusts of the term prescribe a particular method for raising the portions, this implies a negative that they shall not be raised in any other way (d).

Modern settlements usually contain an express direction that the portions may be raised by (among other means) mortgage of all or any of the settled lands and hereditaments for the whole or any part of the term. In the absence of such direction, the power of the trustees of the term to raise money for portions by means of a mortgage is a question of intention to be collected from the context of the settlement or will (e).

The general question as to whether and under what circumstances a direction to raise money out of rents and profits will authorize a mortgage out of the *corpus* of the estate has been already considered (f). This question is now reverted to with special reference to its application to raising money for portions.

It would seem that, according to the more modern decisions, the natural or ordinary meaning of raising a portion by rents and profits, is by the *yearly* profits (g), and the cases which have extended it further are *exceptions* out of the general rule, in which the context has afforded a different construction (h).

(z) 5 Sm 155.

(a) *Wynter v Bold*, 1 S & St. 510, *Sheppard v Wilson*, 4 Ha 392, at p 394.

(b) *Otway-Cave v Otway*, L R 2 Eq 725. See *Gillibrand v Goold*, 5 Sm 149.

(c) See *Dav. Conv* 3rd ed vol. iii p 447.

(d) *Ivy v Gilbert*, 2 P. Wms 12, at p. 19. See *Darves v Wescomb*, 2 Sm 425.

(e) See *Wilson v Halliley*, 1 R & M 590, at p 599.

(f) *Ante*, p 414.

(g) *Ivy v Gilbert*, 2 P Wms 13, *Phillips v Phillips*, 8 Beav 193, *Foster v Smith*, 1 Ph 629, *Shaftesbury v Marlborough*, 2 My & K 111, *Dar bon v Richards*, 14 Sm. 537.

(h) 2 P Wms 19, *Allan v Backhouse*, 2 V & B 65, *Garmistone v Gaunt*, 9 Jur 78.

Thus, where a time certain is prefixed for the payment of portions, and it is evident that the annual profits will not raise the money within that time, the Court has directed a mortgage (*i*). So, also, in a case where the trust of a term was out of the rents and profits to raise 8,000*l.* for daughters' portions, to be paid to them "as soon as conveniently could be," two points were made:—first, whether the 8,000*l.* could be raised by sale or mortgage, and secondly, whether it should carry interest, and from what time, and it was considered, that as the daughters were of age at the time of the father's death, it would be convenient to raise the portions forthwith, and it was decreed, that the portions should be raised by sale or mortgage, and that the 8,000*l.* should carry interest from the death of their father (*l*). The principle applies where the sum is immediately raiseable—a gross sum that must be raised (*l*).

But equity would not raise the portions by mortgage, if the children were of tender years at the death of the father (*m*), and in such case the portions would have become due when the rents would have raised them, and would have carried no interest; as soon as the portions could have been raised by the rents, the land would have borne its burden and have been discharged (*n*).

If the trust be to raise portions out of rents and profits, no time being appointed for payment, and the child dies under twenty-one, and unmarried before it is raised, the portion will, in such case, be raised out of the annual rents, for the Court will not, it seems, direct a mortgage (*o*).

Where an annual sum is directed to be raised for maintenance, and there is an existing life estate, and it is not clearly expressed that the maintenance is not to commence until after the determination of that estate, the question of intention arises as in the case of the portion itself. If it is ascertained to be the intention that the maintenance shall commence notwithstanding the life estate, but the payment of it is clearly confined to be

Trust to raise
annual sum
for main-
tenance

(*i*) *Backhouse v Middleton*, 1 Ch Ca 173, *Heycock v Heycock*, 1 Vern 256, *Berry v Ashham*, 2 Vern 26, *Warburton v Warburton*, 2 Vern 420, *Oheden v Oheden*, 1 Atk 552, *Green v Belcher*, 1 Atk 505, *Shrewsbury v Shrewsbury*, 1 Ves J 234. And see 2 Ves J 481, *n*, and *Allan v Backhouse*, 3 V & B 65, *Wilson v Halliley*, 1 R & M 590.

(*l*) *Tafford v Ashton*, 1 P Wms

416. And see *Stanhope v Thacker*, Prec Ch 435.

(*l*) *Metcalfe v Hutchinson*, 1 Ch D 598. And see *Balfour v Cooper*, 23 Ch D 472, C A.

(*m*) *Evelyn v Evelyn*, 2 P Wms 659.

(*n*) *Ivy v Gilbert*, 2 P Wms 12.

(*o*) *Earl Rivers v Earl of Derby*, 2 Vern 72. See *Evelyn v Evelyn*, 2 P Wms at p 672.

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out of annual profits, it must from necessity either encroach on the life estate, or run in arrear; the former can never be considered the intention, as the term is reversionary to the estate: the maintenance must therefore run in arrear, and when the trust term falls into possession, all the arrears must be paid (*p*). If the trusts for raising the portion and maintenance are extended to sale or mortgage, it was for some time considered doubtful whether the Court would raise the maintenance by way of mortgage; for it is manifest there is some difficulty in accomplishing it, inasmuch as the maintenance is a running sum becoming due quarterly or half-yearly; and in *Pierpoint v. Lord Cheyney* (*q*), Lord Chancellor Parker said that he had not been enabled to find a single precedent for mortgaging a reversion for maintenance; but in the subsequent case of *Ravenhill v. Dansey* (*p*), Lord Chancellor Macclesfield considered it clear, that when the child had no other maintenance, it had been decreed to be raised by mortgage of the reversionary interest of the term; and (*r*), where the term was not reversionary, but the trust was to raise the portion on the death of the jointress, who had a rent-charge, the Master of the Rolls gave maintenance during the life of the widow, and seemed to be inclined to think, that even if the trust had been reversionary, maintenance might, if necessary, have been raised by sale or mortgage (*r*).

The same principle was followed by the House of Lords in *Miltoun v. French* (*s*), and by the Vice-Chancellor of England, in *Freeman v. Simpson* (*t*), where interest was given on legacies, which were charged, after the death of the testator's wife, upon real estate in aid of the personalty, from the time the legacies became due out of the personal estate, as general pecuniary legacies.

In one case (*u*), an estate was limited to the use of the Duke of Newcastle for life, with the remainder to trustees for 1000 years, with remainder to the Earl of Lincoln for life, and the trusts of the term were, to raise a portion for an only daughter of the earl, and maintenance was to be paid, after the death of the earl, out of the rents and profits, and the surplus of the rents and profits to be paid to the person for the time being entitled to the reversion or remainder expectant on the deter-

(*p*) *Ravenhill v. Dansey*, 2 P Wms 179.

(*q*) 1 P Wms 488.

(*r*) *Lyddon v. Lyddon*, 14 Ves. 558, at p 566.

(*s*) 4 Cl & Fin 276

(*t*) 6 Sim 75.

(*u*) *Lady Clinton v. Lord Robert Seymour*, 4 Ves. 440.

mination of the term. It was held that as the maintenance was to be raised out of the annual profits, and not by sale or mortgage, which could not be during the life of the duke, for the duke was not a person entitled to the reversion or remainder expectant upon the determination of the term, the daughter was not entitled to interest until the death of the duke

Where an infant entitled in possession to real estate had no other means of maintenance than the rents, which were insufficient, an order was made that an allowance for his past maintenance should be charged upon, or raised out of, the *corpus* of the estate (*x*) But in two recent cases this decision was disapproved of, and the Court refused to make orders for maintenance out of *corpus*, where infants were entitled in remainder (*y*)

iii.—Legacy and Succession Duty—In raising portions by mortgage, the trustees should take care that the legacy and estate duty either be paid by the portionist, or deducted in ascertaining the amount secured by the mortgage, as the trustees are liable for the duty (*z*), as well as the devisees of the estate subject to the portions whether in fee or for life (*a*) But the trustee or devisee paying the legacy duty can recover it from the portionist (*b*), unless the portions were devised clear of all deductions (*c*). And trustees may raise the amount of estate duty payable or paid by them in respect of portions by sale or mortgage of the term (*d*)

Legacy and estate duty on portions

The same observations will apply to succession duty, on portions raiseable under a settlement of real estate, under 16 & 17 Vict. c 51

Succession duty

Sect 44 of the Succession Duty Act (16 & 17 Vict c. 51), enacts that, besides the successor, the following persons shall be personally accountable for the duty to the extent of the property received by them, namely, “every trustee, guardian, committee, tutor, or curator, or husband, in whom respectively any property or the management of any property, subject to such duty shall be vested, and every person in whom the same shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession”; and all those persons

Power to raise succession duty by mortgage

(*x*) *Re Haworth*, L R 8 Ch A 415, *Fentiman v. Fentiman*, 13 Sim 171, *Notley v Palmer*, 11 Jur N S 968, *Re Allen*, L R 8 Ch A 417, n (*y*) *Re Hamilton*, 31 Ch D 291, C A, *Cadman v Cadman*, 33 Ch D 397, C A.

(*z*) 45 Geo III. c. 28, s 5, 57 & 58 Vict c 30, s 8 (4).

(*a*) *Att - Gen. v Jackson*, 1 Cr & J 101

(*b*) *Hales v Freeman*, 1 Br & B 391

(*c*) *Stow v Davenport*, 5 B & Ad 359

(*d*) 57 & 58 Vict c 30, s 9 (5)

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are authorized to compound, or pay in advance, or commute, the duty, and retain the amount thereof out of the property subject thereto, "or to raise such amount and the expenses incident thereto, at interest on the security of such property, with power to give effectual discharges for the same"; and such security is to have priority over any charge or incumbrance created by the successor

Form where mortgage is simply under the power

iv.—Form of Mortgage for raising Portions, &c.—Where, as is often the case, the precise manner in which portions are to be raised by mortgage is prescribed by the instrument creating the trust, a mortgage made solely in exercise of the power for that purpose must strictly conform to the terms of the power. If the mortgage is made under the power without the concurrence of the tenant for life or other owner of the settled lands subject to the charge of portions, either by reason of his being a minor or unwilling to concur, or from a wish not to let in subsequent incumbrances, it is obvious that, inasmuch as trustees do not usually enter into covenants for payment of principal or interest (*d*), the land will be the only security available to a mortgagee advancing money for raising portions. It is also to be remarked, that though trustees generally may give to a mortgagee a power of sale though not expressly authorized so to do (*e*), trustees of portion-terms secured on large family estates, often refuse to give such a power (*f*)

But these considerations seldom deter intending mortgagees from advancing money for raising portions, as the amount raiseable for that purpose is generally inconsiderable in proportion to the value of the land charged, so that the land alone is a sufficient security for the amount raised. Moreover, such mortgages offer the advantage, especially to trustees advancing money, that they afford an investment which is likely to be permanent, as well as amply secured

Form where owner in fee or for life, &c concurs

If, however, the tenant for life or other owner of the estate is able and willing to concur in the mortgage deed, the mortgage need not be made in exercise of the power, but may be made in any manner the parties please; for the owner, if seised in fee, can obviously raise the money in any way he thinks convenient, and on receipt of the portions by the persons entitled thereto, the charge and the term will cease and determine. And, if the

(*d*) See *ante*, p. 428

(*e*) See *ante*, p. 428

(*f*) Of course, if it is intended that the mortgagee shall not have a power

of sale, the provisions of s. 19 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), must be expressly excluded

owner is only a tenant for life or other limited owner, then, inasmuch as the portions though not actually raised are an "incumbrance" on the property, he can, under his statutory power (*g*), mortgage the settled lands or any part thereof by a conveyance of the fee or by demise, as he thinks most convenient for the purpose of extinguishing the charge

The most usual form which a mortgage for raising portions appears to take, where the owner of the estate concurs, is that of a mortgage by the trustees of the term to the person advancing the money, with a covenant by the owner of the estate for keeping down the interest, sometimes extending also to the payment of the principal; the money raised being paid, by the direction of the trustees, to the portionist who joins for the purpose of acknowledging the receipt of the money (*h*). The concurrence of the portionist, though usual and convenient, is not essential, and may often be safely dispensed with (*i*)

Sometimes the manner adopted for raising a portion by mortgage is, that the portionist shall assign to the mortgagee his share of the sums to be raised, and give the mortgagee a power of attorney to receive it then the tenant for life, if the term is reversionary, makes a demise of a proportional part of the estate to the mortgagee for ninety-nine years, if the tenant for life shall so long live, upon trust to permit the tenant for life to receive the rents until default is made in payment of the interest, and then to receive the rents and retain the interest. The trustees of the term assign a proportional part of the premises comprised in the term to the mortgagee, and there is introduced a proviso for redemption by the tenant for life, or persons in remainder, on payment of the portion and costs, &c. The tenant for life, or (if the term is in possession) the remainderman (if he will concur), covenants for the payment of the money and for the title (*h*).

The mortgage of the term is usually by assignment of the whole term, but sometimes it is made by demise of a part of the term, with a proviso for cesser on payment of the mortgage money (*i*). As the term is not burdened with any rents or onerous covenants or obligations, the only advantage of a demise is, that it saves the necessity for a re-assignment or surrender on redemption

Whether mortgage of portion term should be by assignment or demise.

(*g*) See the Settled Land Act (53 & 54 Vict c 69), s 11

(*h*) Day Conv (4th ed) Vol II pt II, p 462, n.

(*i*) Bythewood & Jarman, Conv, 4th ed Vol III p 1041, n

(*k*) See Coote on Mortgages, 5th ed Vol I pp 296, 297

(*l*) See Prior's Conveyancing, p 225.

CHAPTER XXIV.

MORTGAGES BY ECCLESIASTICAL CORPORATIONS.

Rectories and tithes. **i.—Mortgages by Ecclesiastical Person of Profits of Benefice to secure his own Debts.**—Rectories impropriate and tithes in lay hands may be the subject of mortgage in like manner as any other species of real estate.

Mortgage of profits of ecclesiastical benefice There exists no rule of public policy, independent of restraining statutes, which prevents an ecclesiastic from dealing with his temporalities (*a*).

13 Eliz c 20 By 13 Eliz c 20, it was enacted, that “all chargings of any benefice with cure thereafter, with any pension or with any profit out of the same to be yielded and taken, thereafter to be made, other than rents to be received upon leases thereafter to be made, according to the meaning of that Act, should be *utterly void*” By 3 Car I c. 4, s 2, this Act was made perpetual.

57 Geo III c 99 By 43 Geo III. c 84, 13 Eliz c 20 and 3 Car I. c 4, s 2, were wholly repealed. The 57 Geo. III c 99 repealed 43 Geo III. c 84, and also repealed part of 13 Eliz c 20, but did not repeal in terms the clause relating to the charging of livings.

37 & 38 Vict c. 96. The 57 Geo. III c. 99 was repealed by 1 & 2 Vict c 106, s 1, except such part as repealed any former Acts; and 1 & 2 Vict. c. 106, s. 1, has been repealed by 37 & 38 Vict c 96, but the effect of all these repeals is that 13 Eliz c. 20, so far as relates to charges on benefices, is still in force (*b*)

What securities are void under the Act. A mortgage of pew rents by a vicar of a district church is void under the Act of Elizabeth (*c*). A lease of a rectory and tithes and a receivership deed thereof, being a contrivance to

(*a*) See *Grenfell v Dean and Canons of Windsor*, 2 Beav 514

(*b*) See *Hawkins v. Gathercole*, 6 De G M & G 1, at pp. 20, 21, *Garnett v Bradley*, 3 App Cas 944, at pp 950, 951

(*c*) *Exp Arrowsmith*, 8 Ch. D 96, C A

secure a charge, were held void (*d*) A composition with a clergyman in consideration that his future income may be received by a trustee, and applied in liquidation of his debts after providing for a curate, is void (*e*).

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Where a manor or rectory is specifically allotted to a prebend, the prebendary has power to charge it (*f*) So he may alien any property attached to the office without losing his stall or voice in the chapter (*g*) So the lands and emoluments attached to a canonry (which is an ecclesiastical office without cure) can, it seems, form the subject of a charge or mortgage (*h*) But a mortgage by demise of the lands, messuages, &c, belonging to a canonry of St George's Chapel, Windsor, was held, in the last-mentioned case, not to pass a house in which the canon lived, the house in question being vested in the dean and chapter, and not attached to the canonry, but liable to be exchanged for the house of another canon in the event of a vacancy among the canons, each canon thus taking the temporary use of any particular house for the purposes of residence (*i*); but the canonry itself, as an ecclesiastical office, or even the prebendary, since 13 & 14 Car II. c 4 (with two exceptions), cannot, it seems, be the subject of a grant (*j*).

Charge by prebendary

Where a scheme confirmed by Order in Council under the Pluralities Amendment Act, 1850 (*k*), and the Union of Benefices Act, 1860 (*l*), provided that two city benefices should be united, and that the incumbent retiring in order that the union should have immediate effect should receive out of the annual income of the united benefices certain annuities during the joint lives of himself and the incumbent of the united benefices so long as he should perform the duties of curate thereof, under the title of vicar-in-charge, with a further provision after the death of the incumbent of the united benefices, it was held that the effect of such provisions was not to give to the retiring incumbent a "benefice with cure" within the meaning of the statute 13 Eliz c 20, and that he could accordingly make a valid mortgage of the annuities (*m*).

Benefice with cure

(*d*) *Waltham v Crafts*, 6 Exch 1

(*e*) *Alchin v Hopkins*, 11 K. B. 111

(*f*) *Watson's Clergyman's Law*, 472, *Hare v Buckley*, 11 Q. B. 526, *Doe v Musgrave*, 1 Man & Gr 631

(*g*) *Dean and Chapter of Norwich Case*, 3 Rep 73, 75, b, see Com. Dig Eccl

"Persons," C 4

(*h*) See *Doe v Musgrave*, *sup*, *Greiffell v. Dean of Windsor*, 2 Beav 544

(*i*) *Doe v Musgrave*, 1 Man & Gr 631

(*k*) 13 & 14 Vict c 98

(*l*) 23 & 24 Vict c 142

(*m*) *McBean v Deane*, 30 Ch D 520

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Redemption
of land taxCharges on
church livings
void

Where an incumbent pays off the land tax he has a security on the living if he exercise the option given by the Land Tax Acts (*n*)

A charge on a church living, if made subsequently to 57 Geo III c 99, is void (*o*); but not so, if made in the intermediate period between the passing of 43 Geo III. c 84, and 57 Geo. III. c 99 (*p*); and where a term to secure an annuity was created in the living *prior* to the latter statute, but assigned *subsequently* to it, to secure a sum advanced to redeem the annuity, or to secure a fresh annuity granted in consideration of such sum (*q*), such assignment was held valid; and such term may be assigned as a security for a much larger annuity or sum (*r*); and if in a deed of charge made in the intermediate period, there is a covenant to charge any living subsequently acquired, and an exchange is made prior to the revival of 13 Eliz c 20, the charge on the newly-acquired living will be valid, although the new grant is dated subsequently to the statute 57 Geo. III c 99 (*s*)

The Irish Act, 10 & 11 Car I c 3, does not render invalid a charge on a benefice during the life of the grantor, but only prevents it from binding his successor (*t*)

Though the charge is void, collateral securities—*e g*, covenants, bonds, and warrants of attorney—to secure the debt, are valid, as the transaction is not *malum in se* (*u*)

Charge *per*
indirectum

A charge on a church living which cannot, since 57 Geo III c 99, be created *per directum*, cannot be created *per indirectum*. And therefore a warrant of attorney reciting the annuity deed, and that the warrant is executed to the intent that a sequestration may be obtained by the annuitant and continued during the continuance of the annuity for better securing the same, is void, as showing an intent indirectly to create a charge on the living (*x*)

(*n*) *Kulderbee v Ambrose*, 10 Exch 454. See 38 Geo III. c 60, s. 37, 39 Geo III c 6, s 5

(*o*) *Shaw v Pritchard*, 10 B & Cr 241

(*p*) *Doe v Somerville*, 6 B & Cr 126

(*q*) *Doe v Gully*, 9 B & Cr 344, *Doe v Ramsden*, 4 B & Ad 608

(*r*) *Doe v. Ramsden*, *sup*, *Moore v Ramsden*, 7 A & E 898

(*s*) *Metcalfe v Archbishop of York*, 1 My. & Cr 547

(*t*) *Wise v Beresford*, 3 Dr & War 276

(*u*) *Mouys v Leake*, 8 T R 411, *Doe v Mears*, Cowp 129, *Errington v Howard*, Amb 485 And see *Doe v Barber*, 2 T R 749, *Brown v Rose*, 6 Taunt 124, *Arbuckle v Cowtan*, 3 B & P 321, *Faircloth v Gurney*, 9 Bing 622

(*x*) *Flight v Salter*, 1 B & Ad 673, *Newland v Watkin*, 9 Bing 113, *Saltmarsh v Hewett*, 1 A & E. 812.

An agreement for giving priority to any particular judgment, in execution against a benefice, is void (*y*). But if nothing appears on the instrument necessarily leading to the conclusion that such was the intent, the warrant of attorney will be valid, although the consequence may be that the profits of the living will probably be taken in execution (*z*).

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In three cases of annuity, the Courts have confined the sequestration to the arrears due, but have upheld the warrant of attorney and judgment (*a*). Warrant of attorney

It was decided that a judgment entered up on a warrant of attorney for securing an annuity charged on a living in the North Riding of Yorkshire (supposing the same to be in other respects maintainable), need not be registered under 8 Geo II c 6, by reason that though it may be enforced by sequestration, yet the benefice is not affected by *the judgment* (*b*).

If the intention to affect the benefice does not appear on the face of any of the securities, mere parol evidence of the intention is not admissible to impeach them (*c*). Parol evidence

The result of the authorities has been stated by a learned author, as follows. a warrant of attorney, given by a clergyman, will be valid, although its immediate object and consequence is a sequestration of his benefice; but the intention to affect the living directly or indirectly must not appear on the face of the warrant, nor, as it is conceived, on any collateral instrument (*d*). Result of authorities

ii.—Mortgages by Incumbents of Benefices under Statutory Powers for Building, &c—The incumbent of a benefice is empowered (*e*), with the consent of the ordinary and patron thereof, to borrow and take up at interest a sum of money exceeding one year's, but not exceeding three years' net income of his benefice for the purpose of building, repairing, or purchasing a house and other necessary buildings, or a proper site for such Powers of incumbent to mortgage generally.

(*y*) *Long v Storie*, 3 De G & S 308.

(*z*) *Gibbons v Hooper*, 2 B & Ad 734. And see *Newland v Wathin*, 9 Bing 113, *Fawcett v Gunney*, 9 Bing 622, *Aberdeen v Newland*, 4 Sim 281. See *Kirlew v Butts*, 2 B. & Ad 736, n, *Colebrook v Layton*, 4 B & Ad 579.

(*a*) *Kirlew v Butts*, *sup*, *Moore v Ramsden*, 3 B & Ad 917, n, and *S C* 4 B & Ad 608, *Britten v Wait*, 3 B

& Ad 915

(*b*) *Cotile v Warrington*, 5 B & Ad 447.

(*c*) *Colebrook v Layton*, 4 B & Ad. 579, *Bishop v Hatch*, 4 Jur 318, *Johnson v Brazner*, 1 A. & E 624.

(*d*) *Dav Conv*, Vol II pt n., p 26.

(*e*) 17 Geo III c 53, 21 Geo III c 66, 1 & 2 Vict c 23. These Acts are commonly called "Gilbert Acts."

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house and other necessary buildings, to be used as the parsonage or glebe house and offices for his benefice, such house, if purchased, to be at a distance of not more than one mile from the church; and as a security for the money so to be borrowed, to mortgage the glebe, tithes, rentcharges, rents and other profits and emoluments of his benefice for the term of thirty-five years, the principal so borrowed being repayable by thirty annual instalments, with interest to accrue due thereon and in the same manner; and, subject to the like consents and provisions, an incumbent is empowered (*f*) to borrow any sum of money not being less than one hundred pounds, and not exceeding three years' net income of his benefice, for the purpose of purchasing any lands or hereditaments, not exceeding twelve acres, contiguous to or desirable to be used or occupied with the parsonage house or glebe belonging to such benefice, or for the purpose of building any offices, stables or outbuildings, or fences necessary for the occupation or protection of such parsonage, or for the purpose of restoring the fabric of the chancel of the church of such benefice (when the incumbent is liable to repair the same), or of expenditure upon farm buildings upon lands appertaining to such benefice.

Additions to
parsonage

Money employed in adding additional rooms to a parsonage house may be charged on the living under 17 Geo III. c 53 (*g*).

Who may
advance
money

The incumbent may advance his own money (*g*). But the money may not be advanced by a person whose duty it is to see that the provisions of the Act are properly carried out for the benefit of the living (*h*).

Form of
statutory
mortgage

The mortgage and other necessary deeds must be in the forms prescribed by statute (*i*); and the mortgage-money must be paid to the person authorized to receive the same by the ordinary, patron and incumbent (*k*).

Meaning of
"benefice"

"Benefice" is to be construed to comprise "all rectories with cure of souls, vicarages, perpetual curacies, and chapelries, the incumbents of which respectively in right thereof shall be corporations sole" (*l*).

Successors
bound

A mortgage made by an incumbent in manner above mentioned is binding upon his successors in office (*m*).

(*f*) 28 & 29 Vict c 69, s 1

(*g*) *Boyd v Barker*, 4 Drew 582

(*h*) *Greenlaw v King*, 3 Beav 49.

(*i*) 17 Geo III c 53, Sched, 21
Geo. III. c. 66, Sched.

(*k*) 17 Geo III c 53, s 4.

(*l*) 1 & 2 Vict c 23, s 16

(*m*) 17 Geo III c 53, Sched, 21
Geo III. c. 66, Sched

The Act 1 & 2 Vict c 106, s 62, authorizes the bishop, on the avoidance of a benefice not having a fit house of residence, to raise money for building a residence by mortgage of the glebe, tithes, rents, and profits, and prescribes a form of mortgage given in the schedule to the Act. And by sect. 70 of the same Act, the bishop is empowered to raise money by such mortgage for the purchase of a suitable residence elsewhere than on the glebe without any limit as to distance from the church.

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Charge for residence of bishop

By the statute 5 & 6 Vict c 26, s. 13, where a benefice has been augmented under the statute 3 & 4 Vict c. 113, the powers of incumbents to raise money by mortgage for purchasing, building, or improving their houses of residence are not to be exercised without the consent of the Ecclesiastical Commissioners signified under their common seal.

Mortgage of benefice after sequestration

Under the Ecclesiastical Dilapidations Act, 1871 (*n*), as amended by an Act of the following year (*o*), powers of borrowing on mortgage from the Governors of the Bounty of Queen Anne are conferred upon an incumbent for the purpose of meeting expenses of repairs for which he is liable. These restricted powers are exerciseable by the incumbent concurrently with the above-mentioned general powers. The form of mortgage under these Acts, and the conditions and provisions under which such mortgages may be effected, are prescribed by the sections in the note hereto (*p*). A mortgage made by an incumbent to the Governors of Queen Anne's Bounty may be subsequently modified by the Governors by extending the time for repayment to them of the mortgage-money (*q*).

Powers of incumbent to mortgage to Governors of Queen Anne's Bounty.

By the Ecclesiastical Commissioners Act, 1840 (*r*), it is enacted that the Ecclesiastical Commissioners may "authorize any dean or canon of any cathedral church to raise moneys on his deanery or canonry, for the purpose of building, enlarging, or otherwise improving the residence house thereof, on such terms and conditions as the said Commissioners with the concurrence of the bishop and the chapter shall approve." And it is also provided that all the provisions of "an Act to amend the law for providing fit houses for the beneficed clergy" (*s*) shall

Mortgages by deans or canons of their deaneries or canonries

(*n*) 34 & 35 Vict c 43(*o*) 35 & 36 Vict c 96(*p*) 34 & 35 Vict c 43, ss 17, 38, 62, 64, and 73, 35 & 36 Vict c 96, ss 1, 2, and 3(*q*) 44 & 45 Vict c 25, 49 & 50
Vict c 34, 50 & 51 Vict c 8(*r*) 3 & 4 Vict c 113, s 59(*s*) 1 & 2 Vict c 23, *sup*

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be applied, *mutatis mutandis*, to all such cases in which any dean or canon shall be so authorized to raise moneys on his deanery or canonry for such purpose

It is further provided by the Ecclesiastical Houses of Residence Act, 1842 (*t*), that sect 59 of the Ecclesiastical Commissioners Act, 1840, “shall be extended so as to make lawful the raising of moneys, in the manner and with the authority therein provided, by any dean and chapter, dean or canon, for any purpose of this Act”

Mortgages by
universities
and colleges

By the Universities and College Estates Act (*u*), powers of mortgaging their estates are given to the Universities and Colleges of Oxford, Cambridge, Dublin, Winchester and Eton Colleges, with the consent of the Copyhold Commissioners

By the Universities and Colleges Estates Acts Extension, 1860 (*x*), further powers are conferred; and as to Winchester and Eton Colleges, see 31 & 32 Vict. c 118, ss 24, 25, and 28 And see 43 & 44 Vict. c. 46.

(*t*) 5 & 6 Vict c 26, s 5

(*u*) 21 & 22 Vict c. 44

(*x*) 23 & 24 Vict c 59

CHAPTER XXV

OF MORTGAGES BY MUNICIPAL CORPORATIONS AND OTHER
LOCAL AUTHORITIES.

i.—Mortgages by Municipal Corporations.—By the common law, a body corporate may deal with its property, by way of mortgage or otherwise, as freely as an individual. But restrictions upon the borrowing powers of municipal corporations have been from time to time imposed by the legislature, as regards particular corporations, by various special Acts, and, generally, by the public Acts hereafter mentioned.

Statutory
restrictions
on borrowing
powers of
corporations.

By the Municipal Corporations Act, 1835 (*a*), the councils of bodies corporate elected under the Act were restrained from mortgage and alienation of the lands, tenements, or hereditaments of the corporation, except with the consent of the Lords Commissioners of the Treasury, and after such notice as is required by the Act.

Repealed
statutes

By 6 & 7 Will IV c 104, s 1, and 7 Will IV. & 1 Vict. c 78, s 28, the councils of corporate bodies were authorized to give new securities for old debts.

And by the Municipal Corporations Mortgages Act, 1860 (*b*), in any case where Commissioners of the Treasury approve of any mortgage of any hereditaments of the body corporate of any borough to which the Act applies, they may, as a condition of their approval, require that the money borrowed on the security of such mortgage shall be repaid, with all interest thereon, in thirty years, or any less period, and either by instalments or by means of a sinking fund, or both, as the Commissioners may think fit.

The Municipal Corporations Act, 1882 (*c*), repeals the three first-mentioned Acts generally, and the Municipal Corporations

Stat 45 & 46
Vict c 50

(*a*) 5 & 6 Will IV c 76, s 94

(*b*) 23 Vict c 16, s 1

(*c*) 45 & 46 Vict. c 50, s 5

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Mortgages Act, 1860, as to the cities and towns to which the repealing Act applies

Restricted powers of borrowing under this Act

Sect 108 of the repealing Act re-imposes upon the councils of those bodies corporate to which it applies a restraint upon mortgaging corporate land without the approval of the Treasury, unless authorized so to do by Act of Parliament

Application of the Act

The repealing Act applies "to every city and town to which the Municipal Corporations Act, 1835, applies at the commencement of this Act, and to any town, district, or place whereof the inhabitants are incorporated after the commencement of this Act, and whereto the provisions of the Municipal Corporation Acts are under this Act extended by charter, but to no other place" (d).

The cities and towns in respect to which special provisions as to borrowing were contained in the Municipal Corporations Act, 1835, are those "bodies corporate" mentioned in the schedules A. and B. to that Act (e); the use of the words "council" "corporate land," &c., in the empowering sections of the Act of 1882 seems to show that the provisions of that Act as to borrowing are to extend to such cities and towns only, and not to all the cities and towns to which the Act of 1835 in any way applies

By sect. 106 of the Act of 1882 it is enacted that—

Power to borrow with approval of Treasury

"The council may, with the approval of the Treasury, borrow at interest on the security of any corporate land, or of any land proposed to be purchased by the council under this Act, or of the borough fund or borough rate, or of all or any of those securities, such sums as the council from time to time think requisite for the purchase of land, or for the building of any building which the council are by this Act authorized to build"

Power to mortgage corporate land.

And by sect. 109, the council is empowered, with the approval of the Treasury, to dispose of any corporate land by way of mortgage or charge "in such manner and on such terms and conditions as the Treasury approve."

Repayment of loans

By sects 112 and 113 of the same Act, the Treasury is empowered to require the mortgage debt to be repaid, with interest, within thirty years or any less period, and either by instalments, or by means of a sinking fund to be provided in manner prescribed by the Act

(d) 45 & 46 Vict. c. 50, s. 6

(e) 5 & 6 Will IV. c. 76, ss 94 and 142.

Sect 120 empowers the council of a borough to borrow money from the Public Works Loan Commissioners for buildings by mortgage of the rates

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Power to borrow for buildings

Sects. 125 to 132 inclusive of the same Act contain provisions with regard to mortgage debts, &c, contracted by municipal corporations at different periods prior to the commencement of the Act.

Provisions as to existing mortgages

Where, under a special Act, debentures of a corporation were payable, so many each year, out of the rates by ballot, it was held that the holders of the bonds not drawn were not entitled to sue or have a receiver for payment of their principal (*f*); but an account of the rates was decreed when the corporation had deprived the debenture holder of the benefit of the ballot (*g*)

Remedy of mortgagees.

If debentures are payable out of future rates, the remedy is not a receiver, but a *mandamus* (*h*).

Bonds charged on a borough fund, made up of rents and profits and mortgages of tolls, being ancient franchises, were held (*i*) to be debts affecting the corporation lands, under sect 69 of the Lands Clauses Consolidation Act (*k*).

Bonds charged on borough fund

ii.—Mortgages by Local Authorities under Public Health Acts.

—By the Public Health Act, 1875, s 233, any local authority may, with the sanction of the Local Government Board, for the purpose of defraying any costs, charges, and expenses incurred or to be incurred by them in the execution of the sanitary Acts, or of that Act, or for the purpose of discharging any loans contracted under the Sanitary Acts, or that Act, borrow or reborrow and take up at interest any sums of money necessary for defraying any such costs, charges, and expenses, or for discharging any such loans as aforesaid (*l*).

Power to borrow on credit of rates for sanitary purposes

“Local authority,” for the purposes of this Act, means urban and rural sanitary authorities (*m*)

The Act contains regulations as to the exercising of borrowing powers, and the form, register, and transfer of mortgages and rentcharges (*n*).

Under sects. 4 and 257 the payments for sewerage are a

(*f*) *Preston v Corp of Great Yarmouth*, L R 7 Ch App 655

W. N (1876) 188.

(*g*) *Fletcher v Gibbon*, 23 Beav 212.

(*k*) 8 & 9 Vict c 18

(*h*) *Dewey v Barnes*, 3 Russ 94

(*l*) 38 & 39 Vict c 55

(*i*) *Re Derby Municipal Estates*,

(*m*) *Ibid* s 4

(*n*) *Ibid* ss 234—241.

CHEAP XXV	charge on the whole premises, and on every owner in proportion to his interest (o)
Purpose of providing hospitals, &c	By the Public Health (London) Act, 1891 (p), sanitary authorities in the city of London and the metropolitan area, are empowered to borrow, with the like sanction, for the provision of hospitals and mortuaries, and the purposes of epidemic regulations, and also for the purpose of providing lavatories, &c
Regulations as to borrowing powers	The exercise of borrowing powers by local authorities generally is governed by the Local Loans Act, 1875 (q), which contains regulations as to issue of debentures, debenture stock, and annuity certificates, and provisions as to priority of loans, remedies for non-payment of moneys lent, the discharge of loans within a prescribed period either by annual appropriation or by means of a sinking fund, and other matters relating to loans contracted by such authorities.
Advances by Local Loans Commissioners	Local authorities may borrow, or reborrow to pay off existing loans, in manner prescribed by this Act, notwithstanding any provisions in any other Act previously passed
	A long series of statutes, commencing with 57 Geo III c. 34, and by which the Commissioners of the Treasury were authorized to make advances of public money for various useful public works and purposes, taking securities for the repayment thereof upon the works, and the tolls, and other proceeds derived therefrom, has been repealed by the Public Works Loans Act, 1875 (r), by which the Public Works Loan Commissioners have power to make loans for any of the works mentioned in the first schedule to the Act to any person having statutory or other power to borrow for such purpose.
Power for commissioners for public undertakings to borrow on mortgage of rates, &c.	<p>iii.—Mortgages by Commissioners for Public Undertakings —</p> <p>By the Commissioners Clauses Act (s), for consolidating Acts relating to bodies of commissioners appointed for carrying on undertakings of a public nature, a form is provided for mortgages (which must be by deed) to be made by such commissioners, of the rates or other property under that or any special Act. And all mortgages charged on the same rates, or property, are to be paid <i>pro rata</i> without priority, and any transfer of</p>

(o) *Birmingham Corp v Baker*, 17 Ch D 782
 (p) 54 & 55 Vict. c. 76, s 105

(q) 38 & 39 Vict c 83
 (r) 38 & 39 Vict c 89
 (s) 10 Vict. c 16

such mortgage must be made by deed, and a register is to be kept by the commissioners of the mortgages and transfers; and after registration the transferee is to be entitled to the full benefit of the original mortgage. And if no time is fixed by the mortgage deed for payment of the debt, then, after twelve months, either party may give six months' notice to terminate the mortgage. And provision is made for forming a sinking fund out of the rates mortgaged. And in default in payment of the principal for six months, or of interest for thirty days, and demand in writing made, the mortgagee may, if authorized by the special Act to enforce payment by a receiver, apply to two justices, or in Scotland to the sheriff, for the appointment of a receiver, whose office shall cease when principal, interest, and costs shall have been received by him.

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Provision for receiver

iv.—Mortgages by Prison Authorities.—Prison authorities had power under the statutes 5 Geo IV c 12, s 10, 5 & 6 Vict c 98, ss 3, 5, and 10, 11 & 12 Vict c 39, and the Prisons Act, 1865 (*t*), to borrow money on mortgage of the rates for the purposes of altering, rebuilding existing prisons, and erecting new prisons. These powers were, by the Prisons Act, 1877 (*u*), explained by the Prisons Act, 1884 (*x*), transferred to, and vested in, the Secretary of State. The Act of 1877 gives to prison authorities new borrowing powers for the limited purposes mentioned in sects 17 and 34 of the Act.

Power to borrow for providing prisons

v.—Mortgages for Repair of Bridges.—By the statute 4 & 5 Vict c 49, justices at sessions may borrow money for the repair of bridges, on the county rates, and may charge the rates with interest on the money borrowed, and such further sum as shall insure repayment thereof in fourteen years. This Act gives, in the schedule thereto, a form of mortgage to be used as security for such loans. And by the statute 43 & 44 Vict c 5, mortgages on the county rate may be made by the county authority under the Highways and Locomotive Amendment Act, 1878 (*y*), for the erection of county bridges.

Power of justices to borrow

These powers are, by the Local Government Act, 1888 (*z*), sect 3, transferred to the councils of each county.

Transfer of powers to county councils.

(*t*) 28 & 29 Vict c 126, ss 27—29(*u*) 40 & 41 Vict c 21(*x*) 47 & 48 Vict c 51(*y*) 41 & 42 Vict c 77(*z*) 51 & 52 Vict c 41

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Power of
justices to
borrow

vi.—Mortgages for Purposes of Lunatic Asylums.—By the Lunatic Asylums Act, 1853 (*a*), repealing (*b*) certain earlier statutes (*c*) without prejudice to any act done or contract made thereunder, power was conferred upon the justices of every county in general or quarter sessions assembled, or the major part (not being less than five) of them, and upon the council of every borough, to borrow and take up on mortgage of the county or borough rates any sums of money required for the payment of the moneys, costs, and expenses payable for any of the purposes of that Act or of the said repealed Acts. The same Act provided a form of mortgage, and contained provisions as to payment of interest upon, and as to the repayment of, the principal sums borrowed (*d*).

Transfer of
powers to
county
councils

The above powers of borrowing were, by the Local Government Act, 1888 (*e*), transferred to the council of each county.

By the Lunacy Act, 1890 (*f*), the Act of 1853, and several amending Acts not material to the present purpose, were repealed, and by sect. 274 of the repealing Act it is enacted as follows —

“(1) For the purpose of paying any money payable under this Act, or for repaying any moneys borrowed under this Act or any former Act, authorizing borrowing for purposes of asylum accommodation, the local authority may with the consent of the Local Government Board, and subject to the provisions of the Local Government Act, 1888, and the Municipal Corporations Act, 1882, according as the same respectively are applicable to the local authority, borrow on the security of the county or borough fund, and of any revenue of the local authority, or on either such fund or revenues, or on any part of the revenues, such money as the local authority requires ”

Power of
overseers and
guardians to
borrow.

vii.—Mortgages by Poor Law Guardians.—By a series of statutes passed from time to time, overseers or guardians, with the consent of the Poor Law Commissioners (*g*), overseers by order of the Commissioners (*h*), guardians with the consent of the Poor Law Board (*i*), and district boards of schools and

(*a*) 16 & 17 Vict c 97, ss 47 and 52

(*b*) *Ibid* s 1

(*c*) 8 & 9 Vict c. 126, 9 & 10 Vict. c 84, 10 & 11 Vict c 43.

(*d*) 16 & 17 Vict c 97, ss 49, 50

(*e*) 51 & 52 Vict c 41, ss 3, 69

(*f*) 53 Vict. c 5.

(*g*) 4 & 5 Will IV c 76, ss 23—25 (1834), 29 & 30 Vict c 113, s 8 (1866), 30 & 31 Vict c 106, s 14 (1867), 31 & 32 Vict. c 122, s 35 (1868)

(*h*) 5 & 6 Vict c. 18, s 6 (1842)

(*i*) 32 & 33 Vict c 45 (1869), 34 Vict c 11 (1871), 35 & 36 Vict c 2 (1872), 42 & 43 Vict c. 54, ss 11, 12 (1879)

asylums, with the consent and order of the Poor Law Board (7), have been empowered to borrow money upon the security of the rates of their respective parishes within the limits as to amount and for the several purposes mentioned in the several Acts

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Managers of asylums in the metropolis are empowered to borrow money chargeable in like manner upon the district rates (l).

Metropolitan
Asylums
Board

Sect 6 of the Poor Law Act, 1869, contains a form of deed in accordance with which any security for money borrowed under the authority of any poor law board may be made.

Form of
mortgage

By sect 14 of the Divided Parishes and Poor Law Amendment Act, 1882 (m), it is provided that guardians of unions and managers of school districts shall keep registers of the securities in respect of all sums borrowed by them

Register of
securities

By sect 2 of the Poor Law Act, 1889 (n), it is enacted as follows:—

Borrowing
by guardians
and managers
of district
schools, &c.

“(1) The guardians of any union may, with the sanction of the Local Government Board, borrow for the purpose of raising the expenses incurred, or proposed to be incurred, for any permanent work or object, or any other thing the costs of which ought, in the opinion of the Local Government Board, to be spread over a term of years

“(2) A loan shall not be of such amount as exceeds, or will make, the total debt of the guardians under the Acts relating to the relief of the poor exceed one-fourth of the total annual rateable value of the union

“(3) The Local Government Board may, by provisional order, extend the said maximum to double the amount above authorized, and sections 297 and 298 of the Public Health Act, 1875, shall apply to every such Provisional Order in like manner as if they were herein re-enacted and the guardians were a local authority

“(4) The unapplied balance of any loan raised by any guardians may, with the consent of the Local Government Board, be applied to any purpose for which a loan can be raised under this Act by such guardians

“(5) This section shall apply to the managers of any school district and to the managers of any asylum district, not being the metropolitan asylum district, in like manner as if they were guardians and this section were in terms made applicable thereto, but with the substitution of one-sixteenth of the annual rateable value of the district for one-fourth of the annual rateable value of the union.

(k) 7 & 8 Vict c 101, s 44 (1844),
13 & 14 Vict c 101, s 3 (1848), 14 &
15 Vict c 105, s 16 (1851), 35 Vict
c 2, s 1 (1872), 42 & 43 Vict c 54,
s 13 (1879)

(l) 30 Vict c. 6, s 17 (1867), 32 &
33 Vict c 63, s 9 (1869), 32 & 33
Vict c 102, s 37 (1869), 47 & 48
Vict c 60, s 2 (1884)
(m) 45 & 46 Vict. c 58
(n) 52 & 53 Vict c 56

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"(6) All enactments in the Acts relating to the relief of the poor touching the purposes for which and the amount to which guardians of unions and managers of any school or asylum district to whom this section applies may borrow, shall be repealed without prejudice to anything done thereunder, but every loan under this section shall be made on the like security and be paid off in the like time and manner, and be borrowed and re-borrowed in the like manner as is provided by the enactments in force at the passing of this Act with respect to loans of such guardians and managers."

Mortgages
of rates to
provide burial
grounds

viii.—Mortgages under the Burial Acts—Burial boards appointed at a vestry meeting by the ratepayers of a parish, township or district (*o*), may raise money for providing a burial ground by mortgage of the rates. The powers of a burial board are, in boroughs, vested in the town council (*p*); in the city of London in the Commissioners of Sewers (*q*); and, in rural parishes which have adopted the Burial Acts, in the parish council (*r*).

With regard to such mortgages, it is enacted by the Burial Act, 1857 (*s*), as follows.—

Sect 19 "The clauses of the Commissioners Clauses Act, 1847 (*t*), with respect to mortgages to be executed by the Commissioners, shall be incorporated with this Act, and shall apply to mortgages and other securities to be executed by burial boards; and for the purposes of this Act the expression 'the Commissioners,' where used in the said clauses, shall mean the burial board acting in the execution of the said clauses and the Acts hereinbefore recited or this Act

Sect 20 "Provided always, that for the purposes of providing a sinking fund for paying off the principal money borrowed on mortgages granted under any of the said Acts or this Act, the burial board shall, once in every year, set aside, out of the moneys charged by such mortgages, such sum as they think proper, being a sum equal to or exceeding one-fiftieth part of the principal money so borrowed"

Power of
burial board
of parish
consisting of
several poor
law districts

Where two districts are divided for the purposes of relief of the poor, but form one ecclesiastical parish, the burial board of the whole parish may give a mortgage of the future rates of both districts, the repayment of the money being apportionable between the two districts in proportion to the value of the property in each part as rated for the relief of the poor (*u*).

Powers of
town councils,
&c. to borrow

ix.—Mortgages under the Public Libraries Acts—By the Public Libraries Act, 1855 (*v*), power was given to town councils

(*o*) 15 & 16 Vict c 85, s 11, 18 &
19 Vict. c 128, s 12

(*p*) 17 & 18 Vict c 87, s 2

(*q*) 15 & 16 Vict c 85, s 43.

(*r*) 56 & 57 Vict c. 73, s. 7, *post*,
p. 455

(*s*) 20 & 21 Vict c 81

(*t*) 10 Vict c 18 See *ante*, p 448

(*u*) *Reg v Coleshill* (*Oversees of*), 34
L J Q B 96

(*v*) 18 & 19 Vict. c. 70.

and boards of commissioners, trustees, and other persons acting in the execution of Improvement Acts, to borrow on the security of mortgages and bonds of borough funds, moneys required for erecting, establishing, and maintaining public libraries; and the provisions of the Companies Clauses Consolidation Act, 1845 (*x*), with respect to the borrowing of money on mortgage or bond were, so far as applicable, incorporated in this Act

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on mortgage
of borough
funds

By the Public Libraries Act, 1855, Amendment Act, 1871 (*y*), every local board under the Public Health Act, 1848 (*z*), and the Local Government Act, 1858 (*a*), is empowered to adopt and carry into effect the principal Act, and for that purpose to borrow upon mortgage of the general district rate or any separate rate to be levied under the principal Act in conformity with the borrowing provisions of the Local Government Act, 1858 (*a*)

Power of
local boards
to borrow on
mortgages of
rates

By the Public Libraries Act Amendment Act, 1887 (*b*), the power to erect, establish, and maintain a library given by the Act of 1855 is extended to all "library authorities" as defined by the amending Act, *i. e.*, the council, commissioners, board, or other persons or authority carrying into execution the Public Libraries Acts. And by sect 7 of the amending Act, it is provided that sects. 233, 234, and 236 to 239, inclusive, of the Public Health Act, 1875 (*c*), shall apply with necessary modifications to all money borrowed by any library authority, as if such authority were an urban sanitary authority; and the same section repeals so much of sect 17 of the Act of 1855 as relates to the incorporation of the borrowing provisions of the Companies Clauses Consolidation Act, 1845, except as to money previously borrowed

Extension of
borrowing
powers to
"library
authorities"

By the Public Libraries Act, 1892 (*d*), the foregoing Acts, and other Acts relating to public libraries, are repealed as from the commencement of this Act. For the purposes of this Act, every urban district and every parish not being within an urban district in England and Wales is a library district (*e*), and may adopt the provisions of the Act (*f*). The library authority being, in an urban district, the urban authority, and, in a parish, the Commissioners appointed and incorporated under the Act, are to carry the Act into operation (*g*). "Every

(*x*) 8 Vict c 16 See *post*, p 465(*y*) 34 & 35 Vict c 71(*z*) 11 & 12 Vict c 63(*a*) 21 & 22 Vict c 98(*b*) 50 & 51 Vict c 22(*c*) 38 & 39 Vict c 55(*d*) 55 & 56 Vict c 53(*e*) *Ibid*, s 1(*f*) *Ibid*, s 2(*g*) *Ibid*, s 4

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library authority, with the sanction of the Local Government Board, and in the case of a library authority, being Commissioners appointed by a parish, with the sanction also of the vestry of such parish, may borrow money for the purposes of this Act on the security of any fund or rate applicable for those purposes"; and the above-mentioned sections of the Public Health Act, 1875 (*h*), are incorporated, with necessary modifications, so as to apply to all money borrowed for the purposes of this Act as if the library authority were an urban authority (*i*). Where the Public Library Act, 1892, has been "adopted" by a rural parish, the library authority is the parish council (*j*)

X.—General Borrowing Powers of County and other Local Councils—By sect 69 of the Local Government (England and Wales) Act, 1888 (*l*), county councils are empowered, with the consent of the Local Government Board, to borrow on the security of the county fund, and of any revenues for the consolidation of county debts, the purchase of lands and buildings, the execution of permanent works, the promotion of emigration and colonization, or the paying off of existing loans. And by the same section it is enacted as follows.—

"(5) A loan under this section shall be repaid within such period, not exceeding thirty years, as the county council, with the consent of the Local Government Board, determine in each case

"(6) The county council shall pay off every loan either by equal yearly or half yearly instalments of principal, or of principal and interest combined, or by means of a sinking fund set apart, invested, and applied in accordance with the Local Loans Act, 1875 (*l*), and the Acts amending the same

"(8) Where the county council are authorized to borrow any money on loan they may raise such money either as one loan or several loans, and either by stock issued under this Act, or by debentures or annuity certificates under the Local Loans Act, 1875 (*l*), and the Acts amending the same, or, if special reasons exist for so borrowing, by mortgage, in accordance with sections two hundred and thirty six and two hundred and thirty-seven of the Public Health Act, 1875 (*m*)

"(9) Provided that where a county council have borrowed by means of stock they shall not borrow by way of mortgage except for a period not exceeding five years

"(10.) Where the county council borrow by debentures such debentures may be for any amount not less than five pounds"

(*h*) 38 & 39 Vict c 55.

(*i*) 55 & 56 Vict c. 53, s. 19

(*j*) 56 & 57 Vict. c 78, s. 7, *infra*, p. 455.

(*l*) 51 & 52 Vict c 41.

(*l*) 38 & 39 Vict c 83

(*m*) 38 & 39 Vict c. 55.

By sect 12 of the Local Government Act, 1894 (*n*), a county council may, if necessary, without the sanction of the Local Government Board, and irrespectively of any limit of borrowing, raise money, to lend to a parish council, by loan, subject to the like conditions and in the like manner as any other loan for the execution of their duties, and subject to any further conditions which the Local Government Board may, by general or special order, impose.

By sect 7 of the Local Government Act, 1894 (*n*), the parish meeting of a rural parish may adopt any of the several Acts mentioned in that section, and in the Act referred to as the "adoptive Acts", and by sect 12 of the same Act, parish councils are empowered, with the consent of the county council and the Local Government Board, to borrow money for the following purposes, viz · "(a) for purchasing any land, or building any buildings, which the council are authorized to purchase or build; and (b) for any purpose for which the council are authorized to borrow under any of the adoptive Acts; and (c) for any permanent work or other thing which the council are authorized to execute or do, and the cost of which ought, in the opinion of the county council and the Local Government Board, to be spread over a term of years" The money is to be borrowed "in like manner and subject to the like conditions as a local authority may borrow for defraying expenses incurred in the execution of the Public Health Acts, and sections 233, 234, and 236 to 239 of the Public Health Act, 1875 (*o*), shall apply accordingly, except that the money shall be borrowed on the security of the poor rate and of the whole or part of the revenues of the parish council, and except that as respects the limit of the sum to be borrowed, one half of the assessable value shall be substituted for the assessable value for two years" A charge for the purpose of any of the adoptive Acts is to be ultimately upon the rate applicable to the purposes of that Act.

Borrowing
powers of
parish
councils

xi.—Borrowing Powers of School Boards—School boards, constituted by the Elementary Education Act, 1870 (*p*), were empowered by sect 57 of that Act to borrow money for certain purposes That section was repealed by sect. 10 of the Ellemen-

(*n*) 56 & 57 Vict c 73
(*o*) 38 & 39 Vict c 55

(*p*) 33 & 34 Vict. c 75

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tary Education Act, 1873 (*g*), which conferred upon school boards a similar but slightly varied power of borrowing for the particular purposes, and in the manner mentioned in the repealing section, which is as follows —

Amendment
of 33 & 34
Vict c 75,
s 57, as to
loans

Sect 10 “Where a school board have incurred or require to incur any expense, either—

- (a) in providing or enlarging a schoolhouse, or
- (b) in paying off any debt charged on a schoolhouse provided by them, or on any land acquired by them by gift, transfer, purchase, or otherwise for the purposes of this Act, or
- (c) in any works of improving or fitting up a schoolhouse which, in the opinion of the Education Department, ought by reason of the permanent character of such works to be spread over a term of years,

they may, with the consent of the Education Department, spread the payment over such number of years, not exceeding fifty, as may be sanctioned by the Education Department, and may, with the like consent, for that purpose borrow money on security of the school fund and local rate, and may charge that fund and the local rate with the payment of the principal and interest due in respect of the loan. They may, if they so agree with the mortgagee, pay the amount borrowed with the interest by equal annual instalments not exceeding fifty, and if they do not so agree they shall annually set aside one fiftieth of the sum borrowed as a sinking fund. Provided that no such consent of the Education Department shall be granted unless proof be given to their satisfaction that the additional school accommodation which it is proposed to supply is required in order to provide for the educational wants of the district

“For the purpose of such borrowing the clauses of the Commissioners Clauses Act, 1847 (*r*), with respect to the mortgages to be executed by the Commissioners, shall be incorporated with this Act, and in the construction of those clauses for the purpose of this Act, this Act shall be deemed to be the special Act, and the school board which is borrowing shall be deemed to be the Commissioners”

Loans by
Public Works
Commis-
sioners

By the same section the Public Loans Commissioners are empowered, on the recommendation of the Education Department, to lend money to school boards on the security of the school fund and local rates.

Temporary
loan for cur-
rent expenses

A school board has no power to borrow money and to charge the ratepayers with interest which the board has paid under the contract of loan, for purposes or in manner other than as prescribed by the Act, as, for instance, where a board contracted a temporary loan to meet current expenses, which the school

fund was not sufficient to pay, until they could obtain money out of the rates (s)

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The provisions of the above section are, by the Elementary Education Act, 1876 (t), rendered applicable to the establishing, building and maintaining by school boards of certified day industrial schools thereby established, and certified industrial schools established by the Industrial Schools Act, 1866 (u), with the exception that "one of her Majesty's Principal Secretaries of State" is to be substituted for "education department" throughout the section. It is also enacted that "such establishment and building shall be deemed to be a work for which a school board is authorized to borrow within the meaning of the first schedule to the Public Works Loans Act, 1875" (x).

Power to raise money to build, &c industrial schools

Further powers of borrowing are conferred upon school boards by sect 3 of the Elementary Education (Industrial Schools) Act, 1879 (y), which enacts as follows:—

"Where a school board resolve to contribute any sum of money towards, or to undertake the cost of the alteration, enlargement, or rebuilding, but not of the furnishing, of an industrial school, or the establishment of a school intended to be an industrial school, or the purchase of land required either for the use of an existing industrial school, or for the site of another for the use of an existing industrial school, or for the site of a school intended to be an industrial school, such school board, with the consent of one of her Majesty's Principal Secretaries of State, shall have the same power of spreading the payment of the sums so contributed, or of the cost of such undertaking, over a number of years, and of borrowing money for that purpose, as they have in the case where they resolve to establish an industrial school, and the provisions of the Elementary Education Acts, 1870 and 1873 (z), and the Elementary Education Act, 1876 (a), and the Public Works Loans Act, 1875 (b), shall apply accordingly. For the purposes of this Act, an industrial school means a certified industrial school and a certified day industrial school."

Power of school board to borrow for contribution towards or undertaking cost of enlarging, &c an industrial school

By sect 5 of the Elementary Education (Blind and Deaf Children) Act, 1893 (c), school boards and other "school authorities," as defined by the Act, are invested with similar powers of borrowing to those conferred on school boards by the Elementary Education Acts (d), subject to a discretionary power in the Education Department to consent to the exercise thereof

Power to borrow for education of blind and deaf children

(s) *Reg v Reed*, 5 Q. B. D. 483, C. A.

(t) 39 & 40 Vict. c. 79, s. 15

(u) 29 & 30 Vict. c. 118

(x) 38 & 39 Vict. c. 89

(y) 42 & 43 Vict. c. 48

(z) 33 & 34 Vict. c. 75, 36 & 37 Vict. c. 86

(a) 39 & 40 Vict. c. 79

(b) 38 & 39 Vict. c. 89

(c) 56 & 57 Vict. c. 42

(d) *Vide sup*

CHAPTER XXVI.

OF MORTGAGES BY BUILDING AND FRIENDLY SOCIETIES.

Unincorporated societies still governed by the Act of 1836

i.—As to Unincorporated Building Societies.—Benefit building societies were, prior to 1874, governed by the Benefit Building Societies Act, 1836 (a) Societies formed under that Act were not corporate bodies, but acted and held their property through the medium of directors and trustees This Act was repealed by the Building Societies Act, 1874 (b), except as regards societies then ~~subsisting and incorporated~~ ^{existing} Many societies, formed under the repealed Act, still exist; and some of these, not having obtained certificates of incorporation ~~under the later Act~~ ^{under the repealed Act}, are still regulated by the provisions of the repealed Act

Borrowing powers of an unincorporated society

The Act of 1836 contained no provisions authorizing the directors of building societies to borrow money; and accordingly the power of an unincorporated society to borrow depends on its rules

Loans from strangers

Unless the rules otherwise provide, the directors may borrow from persons who are not members of the society, such persons are creditors entitled, on the winding up of the society, to be paid in priority to the members of all classes, including those who have previously given notice of withdrawal (c).

Provision that loan shall be a first charge

Where the rule under which a loan is contracted provides that the money borrowed shall be a first charge on the funds and property of the society generally, the lenders will not be allowed to take special securities on particular property (d).

Members not personally liable for money borrowed

Directors borrowing money for a society cannot pledge the individual credit of members; any rule purporting to empower them so to do would be so far *ultra vires*, as being inconsistent with the nature of a building society under the Act (e).

(a) 6 & 7 Will. IV c 32. See *post*, p 513

(b) 37 & 38 Vict c 42, s. 7. See *post*, p 544

(c) *Murray v Scott*, 9 App Cas 519, *Re Mutual Aid Permanent Building*

Soc, 30 Ch D 434

(d) *Murray v Scott*, *sup*. See *Small v Smith*, 10 App Cas 119

(e) *Murray v Scott*, 9 App Cas at p 533 See *Re Mutual Aid Permanent Building Soc*, *sup*.

The rules of an unincorporated building society may authorize the directors to borrow money for the purposes of the society without imposing any limit as to the amount to be so borrowed; and loans contracted under such rules are valid (f).

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Where rules give unlimited power to borrow.

If the rules give to the directors of an unincorporated society a power to borrow, limited as to amount, the society will not be liable for any loan in excess of the prescribed limit (g). So, also, if the rules authorize the directors to raise money for certain specified purposes only, a loan for other purposes will create no liability against the society (h). A person lending money to the society is affected with notice of the limitation of borrowing powers imposed by the rules (i).

Where rules give limited power to borrow

An unincorporated society has no power to borrow money unless authorized by its rules, either expressly or by necessary implication, by reason of such borrowing being properly incident to the course and conduct of the business for its proper purposes, as indicated by the rules (k).

Where rules give no power to borrow

It must be borne in mind that from the 2nd November, 1874, to the 22nd April, 1875, unincorporated societies certified under the repealed Act, 6 & 7 Will IV. c. 32, were deemed to be societies under the Act of 1874 (l), and accordingly had power to borrow within the limits prescribed by the later Act, though no express borrowing powers were given by the rules.

Where a society has no power to borrow at the time of the loan, and a security given for the money borrowed after borrowing powers have been obtained will be void (m).

Borrowing powers acquired after date of loan.

Where officers of a society borrow without authority, they may be entitled to the benefit of the equitable doctrine of subrogation, that is to say, that if they make payments for purposes of the society out of the borrowed moneys, they may stand in the place of the persons to whom the payments were made, and to claim against the society for the amounts so paid (n).

Subrogation

(f) *Murray v Scott*, 9 App Cas 519

(g) *Chapleo v Brunswick Building Soc*, 6 Q B D 696, C A

(h) *Davis' Case*, L R 12 Eq 516, *Moye v Sparrow*, 22 L T 154

(i) *Per Baggallay*, L J, in *Chapleo v Brunswick Building Soc*, 6 Q B D at p 712 See also *Portsea Island Building Soc v Barclay*, (1894) 2 Ch 298, C A

(k) *Cumhiffe, Brooks & Co v Blackburn Benefit Building Soc*, 9 App Cas 857, 865 See *Richardson v Williamson*, L R 6 Q B 276, *Re National Building Soc*, *Exp*

Williamson, L R 5 Ch A 309, *Chapleo v Brunswick Building Soc*, 6 Q B D 696, C A, *Exp Watson*, *Re Sheffield Permanent Building Soc*, 21 Q B D 301

(l) See 37 & 38 Vict c 42, s 8, repealed by the Building Societies Act, 1875 (38 Vict c 9), s 2

(m) *Exp Watson*, 21 Q B D 301 See *Re Bottom Gate Industrial Soc*, 40 W R 139.

(n) *Owen v Roberts*, 57 L T 81 See also *Baroness Wenlock v River Dee Co*, 19 Q B D 155, C A

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Liability of
directors for
unauthorized
borrowing

Directors borrowing money without authority have in several cases been held personally liable for the amount borrowed even in the absence of any fraud on their part (o).

Repeal of
former Acts,
how far

ii.—As to Incorporated Building Societies —By the Building Societies Act, 1874 (p), the statute 6 & 7 Will IV c 32, is repealed, but this repeal is not to affect any subsisting society certified under the repealed Act, until such society shall have obtained a certificate of incorporation under the Act of 1874 (q), and is not to affect its past operation, or the force or operation, validity, or invalidity of anything done or suffered, or any bond or security given, or any right, title, obligation or liability accrued, or any proceedings taken, thereunder, or under the rules of any society which has been certified thereunder

Incorporation
of societies

Every society subsisting at the date of the commencement of the Act of 1874 (i), or thereafter established, upon receiving a certificate of incorporation under the Act, is and becomes a body corporate by its registered name, having a perpetual succession, until terminated or dissolved as provided in the Act, with a common seal (s)

The Court has no power to declare the incorporation of a society void (r)

Incorporated building societies, whether originally formed under the Act of 1836 or since the Act of 1874 came into operation, are governed by the Act of 1874, as amended by the Acts of 1875 (u), 1877 (v), 1884 (y), and 1894 (z), and by the regulations issued by the Secretary of State under sect 44 of the Act of 1874

Power to
borrow.

An incorporated benefit building society has no power to borrow money, except so far as authorized by statute and by its rules (a);

(o) *Collen v Wright*, 8 E & B 301,
Godwin v Francis, L R 5 C P 295,
Richardson v Williamson, L R 6 Q
B 276, *Chapleo v Brunswick Building
Soc*, 6 Q B D 696, C A, *Cross
v Fisher*, 65 L T 114, *Fubank's
Exors v Humphreys*, 18 Q B D 54.

(p) 37 & 38 Vict c 42, s 7

(q) See 38 & 39 Vict c 9, s 2

(r) The 2nd November, 1874 See
ibid

(s) 37 & 38 Vict c 9, s 9 The form
of a certificate of incorporation is given
in the Schedule to the Building Socie-
ties Act, 1877 (40 & 41 Vict c. 63)

(t) *Glover v Giles*, W N (1881)
59

(u) 38 & 39 Vict c 9

(x) 40 & 41 Vict c 63

(y) 47 & 48 Vict c 41

(z) 57 & 58 Vict c 47

(a) *Re Kent Benefit Building Soc*, 1
Dr & S 417, *Re National Permanent
&c Society*, L R 5 Ch A 309,
Laving v Reed, L R 5 Ch A 4,
Moye v Sparrow, 18 W R 400, *Re
Victoria Permanent, &c Society, Hall's
Case*, L R 9 Eq 605, *Durham Co.,
&c. Building Soc*, L R 12 Eq 516

but deeds, deposited as securities by such a society, will not be ordered to be delivered up (b) CHAP XXVI

The power of incorporated societies to borrow money is regulated by the 15th section of the Act of 1874, which contains the following provisions:— Statutory borrowing powers of incorporated societies

“With respect to the borrowing of money by societies under this Act, the following provisions shall have effect:

“(1) Any society under this Act may receive deposits or loans at interest within the limits in this section provided from the members or other persons, or from corporate bodies, joint stock companies, or from any terminating building society, to be applied to the purposes of the society

“(2) In a permanent society the total amount so received on deposit or loan, and not repaid by the society shall not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members.

“(3) In a terminating society, the total amount so received and not repaid, may either be a sum not exceeding such two-thirds as aforesaid, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force

“(4) Any deposits with or loans to a society under this Act, made before the commencement of this Act in accordance with its certified rules, are thereby declared to be valid and binding on the society, but no further deposits or loans are to be received by such society except within the

“(5) limits provided by this section

Every deposit book or acknowledgment, or security of any kind given for a deposit or loan by a society, shall have printed or written therein or thereon the whole of the 14th and 15th sections of the present Act” (c)

(repealed) By sect 1 (h) of the Building Societies Act, 1894 (d), Limit of borrowing powers
repealing but virtually re-enacting sect 16 (2) of the Act of 1874), the rules of every society shall set forth whether the society intends to avail itself of the borrowing powers contained in the Act, and, if so, within what limits not exceeding the limits prescribed by the Act; and where the original rules of a society are altered, the altered rules must similarly set forth whether the society intend to borrow.

Sect 43 provides that “if any society under this Act receives loans or deposits in excess of the limits prescribed by this Act, the directors or committee of management of such society Personal liability of directors for exceeding powers

(b) *Wilson's Case*, L R 12 Eq 516

(c) Sect 14 relates to the liability

of members

(d) Regulations of 1884, r 5.

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Alternative limits in case of terminating society

Amount for the time being secured by mortgages from members.

Amount borrowed.

Overdrawn banking account

Limits of borrowing power

receiving such loans or deposits on its behalf shall be personally liable for the amount so received in excess" (e).

A terminating society may adopt by its rules either of the two alternative limits provided by sect. 15, but the alternative so adopted will be the limit prescribed by the Act within the meaning of sect. 43, if such limit is exceeded, the directors will be liable for the excess, even though the other alternative limit is not exceeded (f).

In ascertaining the "amount for the time being secured to the society by mortgages from its members" within the meaning of sect. 15, sub-sect. 2, such amount is not to be restricted to the amount of principal secured, but includes the whole amount due on the securities of members at the time of the loan to the society for principal, interest, fines, or otherwise, and all instalments not then due, secured by the mortgages (g); and that where advances so secured were made in respect of shares (h).

In ascertaining the limits of the statutory power of borrowing, the total amount borrowed from all sources must be included (i).

An overdrawn account with a banker secured by deposit of title deeds is a loan within sect. 15 of the Act (k).

By sect. 14 of the Building Societies Act of 1894 (l), it is enacted as follows:—

"In calculating the amount for the time being secured to a society under the Building Societies Acts by mortgages from its members, for the purpose of ascertaining the limits of its power to receive deposits or loans at interest, the amount secured on properties, the payments in respect of which were upwards of twelve months in arrear at the date of the society's last preceding annual account and statement, and the amount secured on properties of which the society had been twelve months in possession at the date of such account and statement, shall be disregarded.

"Provided that this section shall not affect the validity of any deposit or loan which was within the limit provided by law at the time when it was received, and, so far as regards any amount secured either on properties, the payments in respect of which are upwards of twelve months in arrear at the passing of this Act, or

(e) See *Cross v. Fisher*, (1892) 1 Q. B. 467.

(f) *Looker v. Wrigley*, 9 Q. B. D. 397.

(g) *Neath Building Soc. v. Luce*, 43 Ch. D. 158.

(h) *Exp. Johnson & Greenwood*, 45 Ch. D. 463.

(i) *Ibid.*

(k) *Looker v. Wrigley*, 9 Q. B. D. 397, *Cunliffe, Brooks & Co. v. Blackburn Building Soc.*, 9 App. Cas. 857.

(l) 57 & 58 Vict. c. 47.

on properties in the possession of the society at the passing of this Act, shall not come into operation until the expiration of three years from the passing of this Act”

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It is to be observed that neither the Act of 1836 nor the Act of 1874 expressly empowered building societies to mortgage their property as a security for deposits or loans, but the reference to “securities” in sect. 15 appears impliedly to give this power, and the existence of the power is, in practice, assumed without question (*m*).

Securities
by building
societies

Securities given by a building society may be enforced against the society, although sects. 14 and 15 are not indorsed thereon, the enactment in sect 15 directing this to be done being only directory (*n*).

Enforcement
of security.

Sub-sect (5) of sect 15 of the Act of 1874 is directory only, and an omission to comply with its requirements will not vitiate a security given by a building society for a loan (*o*).

iii.—As to Friendly Societies.—By the Friendly Societies Act, 1875 (*p*), a friendly society, or any branch of such society, may, if the rules thereof so provide (and with a limitation as to benevolent societies), hold, purchase, or take on lease, any land in the name of its trustees for the time being, in every county where it has an office, and may mortgage the same, and no mortgagee shall be bound to inquire as to the authority for any mortgage by the trustees, and the receipt of the trustees shall be a discharge for all moneys arising from or in connection with such mortgage.

Power to hold
land and
mortgage

(*m*) See also sect 19 of the Act of 1874

D 440, C A

(*o*) *Ibid* at p 452

(*n*) *Re Guardian Permanent Benefit Building Soc*, *Hawkins' Case*, 23 Ch

(*p*) 38 & 39 Vict c 60, s 16

CHAPTER XXVII

OF MORTGAGES BY COMPANIES.

SECTION I.

OF THE BORROWING POWERS OF COMPANIES

Distinction
between
companies
incorporated
by charter
and by sta-
tute

Charter
companies

Statutory
companies

i.—Of the Power of Companies to borrow generally.—With regard to the powers of companies to borrow money on mortgage, a distinction must be drawn between companies which are incorporated by charter, and companies which are created by statute (a).

Companies incorporated by charter, being corporations at common law, may, by instruments under their common seal, except so far as prohibited or controlled by their charter of incorporation, dispose of their property, by way of mortgage or otherwise, as freely and fully as individuals (b).

But statutory companies, whether created by private Acts or under the general Companies Acts are not common law corporations, and, accordingly, derive their powers of mortgaging or otherwise dealing with their property from their instruments of incorporation. Companies of the former class, therefore, have no powers beyond such as are expressly or by necessary implication conferred by the special Acts to which they owe their existence (c). But if no express borrowing powers are given by the particular Act such powers may be implied, if the raising of money by loan is necessary for the furtherance of the objects of the company as defined by that Act (d).

(a) See Buckley on Companies, 6th ed p 15

(b) *Sutton's Hospital Case*, 10 Rep 1, *Riche v. Ashbury Railway Carriage Co.*, L R 9 Ex. 224, 263

(c) *Lady Wenlock v Ruer Dec Co*, 38 Ch. D. 534, C A

(d) Per Lord Cranworth in *Harokes v Eastern Counties Rail Co*, 5 H L C 331, per Lord Selborne in *Blackburn Building Society v Cunliffe, Brooks & Co*, 22 Ch D. 61, at p 70, C A. And see per Lord Blackburn in *Lady Wenlock v Ruer Dec Co*, 10 App Cas. 354, at p 360.

An ordinary joint stock company has no powers except such as are expressly or by implication conferred by its memorandum of association (*e*)

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Joint stock
companies

ii.—Borrowing Powers of Railway and other Companies incorporated by Special Acts—By the Railways Regulation Act, 1844 (*f*), railway companies are prohibited under penalties from issuing loan notes and other securities for money advanced to them, otherwise than under the provisions of Acts of Parliament authorizing such companies to raise such money and to issue such securities

Mortgages by
railway com-
panies

By this Act the borrowing of money by railway companies otherwise than in conformity with the terms of their special Act is impliedly forbidden (*g*)

By 10 & 11 Vict c 94, canal and navigation companies who have adopted 8 & 9 Vict c 42, for enabling them to become carriers upon their canals, are authorized to borrow sums, not exceeding one-tenth of the paid up capital, for the purposes of that Act, in like manner as provided by 8 & 9 Vict c 16

Mortgages by
canal com-
panies

The Companies Clauses Consolidation Act, 1845 (*h*), contains provisions regulating the borrowing of money on mortgage or bond by companies constituted by special Acts. The effect of these provisions may be shortly stated as follows:—Companies authorized by their special Acts to borrow on mortgage or bond, may, subject to the restrictions contained in their special Acts, borrow on mortgage or bond such sums as shall from time to time, by an order of a general meeting of the company, be authorized to be borrowed, not exceeding in the whole the amount prescribed by the special Act, and, for securing the repayment of the money borrowed, may mortgage the undertaking and future calls on the shareholders or give bonds (sect 38). After paying off any money so borrowed, the company may in like manner re-borrow the amount paid off (sect. 39). The company is restricted from borrowing without production of a justice's certificate that a definite portion of the capital is subscribed or paid up (sect. 40). The mortgage or bond is to

Regulations
as to mort-
gages by
companies
constituted
by special
Acts

(*e*) Per Lord Selborne in *Ashbury Railway Carriage Co v Riche*, L R 7 H L at p 693. See *infra*, p 467

(*f*) 7 & 8 Vict c 85, s 19

(*g*) *Chambers v Manchester, &c Rail Co*, 5 B & S 588

(*h*) 8 & 9 Vict c 16, ss 38–55. This Act applies to every company incorporated after the passing thereof by any special Act, save so far as expressly varied or excepted by such Act. See sect 1 of the Act

CHAP XXVII

be by deed, duly stamped, and wherein the consideration shall be truly stated (*l*), and may be according to the form in the schedule C or D of the Act (sect 41). Sect. 42 contains provisions for apportioning the tolls, &c, comprised in mortgages among the different mortgagees *pro rata* according to the sums respectively advanced by them without regard to priority of dates (*k*); and sect 43 provides that no mortgage of future calls shall, unless expressly so provided, preclude the application of such calls for the purposes of the company. A register of mortgages and bonds is to be kept by the secretary (sect 45). Transfers of mortgages and bonds are to be by deed, duly stamped, and may be according to the form in schedule E of the Act (sect 46). Transfers are to be registered (sect 47). Interest is to be payable half-yearly unless otherwise agreed, and in preference to dividends (sect. 48). Transfers of interest are to be by deed, duly stamped (sect 49). A time may be fixed for repayment, upon the expiration of which principal and arrears of interest will become payable on demand, and unless otherwise stipulated, at the office of the company (sect 50). Where no time is fixed, the principal and any arrears of interest will be repayable after the expiration of twelve months from the date of the mortgage or bond, upon six months' notice in writing or print by either party (sect 51). Interest is to cease on the expiration of the notice (sect 52). The appointment of a receiver is provided for by sects 53 and 54; and sect 55 provides that the account books of the company shall be open to the inspection of the mortgagees.

Mortgage of
proceeds of
surplus lands

A railway company may lawfully raise money on the security of the sale money and rents and profits of their surplus lands, irrespective of the borrowing powers under their Act (*l*).

Re-borrow-
ing

Money paid off on a debenture of a railway company could not have been re-borrowed without the authority of a general meeting, unless the money were so re-borrowed to pay off any existing mortgage or bond (*m*). But now, money borrowed to

(*l*) The consideration, if apparent, need not be stated in terms. *Land-owners, &c Drainage Co v Ashford*, 16 Ch D 412.

(*k*) In *Perkins v Deptford Pier Co*, 13 Sim 277, a similar provision in a special Act was held merely to regulate the rights of mortgagees of the tolls, &c as between themselves, and not to affect the rights of a prior mort-

gagee of the lands of the company. See *Pontet v Basingstoke Canal Co*, 3 Bing N C 433, *Pardoe v Price*, 16 M & W 267.

(*l*) *Imperial Mercantile, &c Assoc v London, Chatham & Dover Rail Co*, 15 W R. 1187.

(*m*) 8 & 9 Vict c 16, s 39. See *Fountaine v Carmarthen Rail Co*, L R 5 Eq 316.

pay off debentures falling due is deemed money borrowed under statutory powers without any general meeting, as to railway companies (n) and as to other companies (o)

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Where debentures are issued contrary to statutory enactment equity can give no relief against the illegality (p); and debentures issued in excess of the limit authorized by a special Act are void (q), but the directors would be personally liable, if the loans were issued under their authority and paid to their agents (r).

Liability for loans in excess of borrowing powers under special Act

iii.—Borrowing Powers of Joint Stock Companies.—In the case of joint stock companies formed under the Companies Acts, the authority of a company to borrow money depends on its objects and the nature of its business as defined in its memorandum of association, including in such definition the general clause empowering the company to do all things “incidental or conducive to” its special objects (s). It has been expressly held that a company cannot, even by apt and unambiguous words in the memorandum, reserve to itself powers, such as a power to reduce its shares, whereby the original conditions contained in the memorandum would be altered (t), and the principle that a contract upon a matter not included in a memorandum cannot be supported has been repeatedly recognized by the Courts (u)

Power of companies formed under the Companies Acts depends on objects as defined in memorandum.

The borrowing of money may be expressly specified as one of the objects of the company; and where a company had power by its memorandum to “dispose of” its lands, a mortgage on its lands, given to its bankers to secure an overdraft, was held valid (w).

Express power to borrow

(n) 30 & 31 Vict c 127, s 26

(o) 32 & 33 Vict c 48, s 4 See *Weeks v Propert*, L R 8 C P 434

(p) *Re Cork & Youghal Rail Co*, L R 4 Ch A 748, 762

(q) *Fountainne v Carmarthen Rail Co*, L R 5 Eq 316, *Chambers v Manchester, &c Rail Co*, 5 B & S 588, *Chapleo v. Brunswick, &c. Soc*, 6 Q B D 696, C A, *Whitehaven Joint Stock Banking Co v Reed*, 54 L T 360, C A, *Furbanks Executors v Humphreys*, 18 Q B D 54, C A And see *Barwick v English Joint Stock Bank*, L R 2 Ex 259, *Mackay v Commercial Bank of New Brunswick*, L R 5 P C 394, *Western Bank of Scotland v Addey*, L R 1 H L Sc 145

(r) *Chapleo v Brunswick Building*

Soc, 6 Q B D 696, C A

(s) See sect 12 of the Companies Act, 1862 And see *per* Lord Cairns, C, in *Ashbury Railway Carriage Co v Riche*, L R 7 H L 653, at p 673 See also *Lundley on Companies*, pp 164, 190, *Buckley on Companies*, 6th ed pp 15, 164

(t) *Re Financial Corporation, Holme's Case*, L R 2 Ch A 714, 733

(u) *Riche v Ashbury Railway Carriage Co*, L R 9 Ex 224, at pp 291 *et seq*, *Ashbury Railway Carriage Co v Riche*, L R 7 H L 653, *Re German Date Co*, 20 Ch D 169, 186, *Theror v Whitworth*, 12 App Cas 409, 417, 433.

(w) *Re Patent File Co*, L R 6 Ch A 83

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Power to
alter memo-
randum

A company registered under the Companies Acts may now, by the Companies (Memorandum of Association) Act, 1890 (y), with the sanction of the Court, alter the provisions of its memorandum of association or deed of settlement, so as (among other things) to carry on its business more economically or more efficiently, or to attain its main purpose by new or improved means, and the Court may sanction an alteration so as to enable the company to issue debentures (z)

Power
implied by
nature of
business

In some cases a power is implied from the character of the business carried on by the company, as in the case of a mortgage of ships by a shipping company (a), or in the case of a mortgage by an insurance company for meeting pressing demands (b), and a trading company has general power to borrow money to such an extent as is reasonable and necessary for the purposes of the business (c)

Banking
companies.

So also mortgages given by banking companies for moneys advanced to ~~them~~ ^{them} ~~are not~~ ^{are not} ~~to be~~ ^{are not} ~~held on~~ ^{are not} ~~the ground~~ ^{are not} ~~that a power~~ ^{are not} ~~to borrow money and to give securities for~~ ^{are not} ~~the same is neces-~~ ^{are not} ~~sarily incident to the business of bankers (d)~~ ^{are not}

Extent of the
borrowing
powers of
companies
generally.

Where a company, incorporated either by a special Act or under the Companies Acts, has express or implied powers of borrowing, they may give a security for a present advance or for a past debt (e) A debt incurred before incorporation of a company may be the subject of a mortgage (f)

Memorandum
limiting
amount to be
borrowed

If by the memorandum of association or deed of settlement the borrowing powers of a company are restricted to a specified amount or exerciseable on certain conditions, money cannot be borrowed to a greater amount, or except on those conditions (g)

(y) 53 & 54 Vict c 62 As to the principles on which the Court will sanction an application by a company to alter its memorandum, see *Re Government Stock Investment Co*, (1891) 1 Ch 649, S C. (No 2), (1892) 1 Ch 597

(z) *Re Reversionary Interest Soc*, (No 1), (1892) 1 Ch 615

(a) *Re Australian Steam Clipper Co*, 4 K & J 733, *English Channel Steamship Co v Rolt*, 17 Ch D 715

(b) *Gibb's Case*, L R 10 Eq 312

(c) *Re Australian Steam Clipper Co*, *sup*, *Bryon v Metropolitan Saloon Co*, 3 De G. & J 123, *Peruvian Railways Co v Thames, & Co*, L R 2 Ch A 617, *Re Hamilton's Windsor Ironworks Co*, 12 Ch D. 707, *General*

Auction Estate, &c Co v Smith, (1881) 3 Ch 432, *Jackson v Rainford Coal Co*, (1896) 2 Ch 340

(d) *Bank of Australia v Breuillat*, 6 Moo P C 152, 195

(e) *Re Inns of Court Hotel Co*, L R 6 Eq 82, *Howard v Patent Ivory Co*, 33 Ch D 155

(f) *Scott v Colbourn*, 26 Beav 276 See *Re Bagnalstown and Wexford Rail Co*, L R 4 Eq 505

(g) *Lady Wenlock v River Dee Co*, 10 App Cas 354 See *Re Pooley Hall Colliery Co*, 18 W R 201, *Ashbury Railway Carriage Co v Riche*, L R 7 H L 653, *Att-Gen v Great Eastern Rail Co*, 5 App Cas 473, at p. 481, *English Channel Steamship Co v Rolt*, 17 Ch D 715

So, where a deed of settlement of a company provided that money might be borrowed on a resolution of the board of directors, and that every mortgage was to be sealed with the seal of the company, it was held that a mortgage not complying with these requirements was invalid (*h*). But it was held later, that under the same deed of settlement the company was not precluded from giving an equitable charge by deposit, authorized by resolution of the board of directors, as security for a debt due to the bankers of the company (*i*).

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Where a company has powers of borrowing up to a limited amount, and some of its securities are paid off, it may give mortgages or debentures instead or in renewal of the old securities, provided that the total prescribed limit is not exceeded, and that the new issue is in conformity with statutory provisions and the regulations of the company (*h*). Power of re-borrowing

In the absence of any restrictive provisions the borrowing powers of a limited company may be exercised, at any time after the commencement of business, without reference to the amount of capital which may have been subscribed (*l*). Time when powers may be exercised

A power given by the memorandum to borrow "on mortgage" will authorize the giving of an equitable charge to secure a loan, as by deposit of deeds (*m*); and the same rule will apparently apply whether the borrowing powers of the company are expressly or are to be implied from the nature of its business (*n*). A security which shows an intention to create a charge on the property of the company may be enforceable in equity, though defective as a legal mortgage (*o*). Power to borrow "on mortgage" includes equitable charge

If a company has no power of borrowing expressly given by its memorandum of association, or necessarily implied from the nature of its business, it cannot confer such a power on itself, or on its directors, by its articles of association. A contract by a company or its directors, not authorized by the memorandum, is Articles cannot confer borrowing powers

(*h*) *Re General Provident Ass Co*, 38 L J Ch 320

(*i*) *Re General Provident Ass Co*, *Exp National Bank*, L R 14 Eq 507

(*k*) *Fountaine v Carmanthem Rail Co*, L R 5 Eq 316 See *Irvine v Union Bank of Australia*, 2 App Cas 366

(*l*) *Macdougall v Jersey, &c Co*, 2 H & M 528

(*m*) *Re Patent File Co*, L R 6 Ch A. 83

(*n*) See *Athenaeum Life Ass Soc*, 4 K & J 549, 562, *Riche v Ashbury Railway Carriage Co*, L R 9 Ex 224, at pp 264, 292, *Gibb's Case*, L R 10 Eq 312, *Exp National Bank*, L R 14 Eq 507, *Re Hamilton's Windsor Ironworks Co*, 12 Ch D 707.

(*o*) *Re Strand Music Hall Co*, 3 De G J & S 147, *Ross v Army and Navy Hotel Co*, 34 Ch D 43, C A., *Re Queenstand Land and Coal Co*, (1894) 3 Ch 181

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Articles may regulate mode of exercising such powers

wholly null and void, and cannot be rendered binding on the company even by the assent of every individual shareholder (*p*)

But the memorandum and articles are to be read as one document (*q*), and the latter may be referred to for the purpose of explaining or supplementing the former (*r*). Accordingly if a company has power to borrow by virtue of its memorandum, the articles may regulate the mode of exercising the power by prescribing the limits within which, and the persons by whom, the power is to be exercised, and the formalities to be observed in exercising the power

Special resolution

The want of a provision in the articles as to the mode of exercising the power may be supplied by a special resolution under sects 50 and 51 of the Companies Act, 1862 (*s*). And articles limiting the amount to be borrowed may be similarly extended (*t*).

Articles limiting amount to be borrowed

Where a memorandum of association gave to the company a power of borrowing without limit, but the articles provided that the directors should have power to borrow on the security of the assets of the company to an amount not exceeding two-thirds of the capital of the company for the time being not called up, it was held that in computing the limit "capital not called up" included shares which had not been issued (*u*).

Issue of debentures at a discount

Prima facie a company, having power to borrow on such terms as they think fit, may issue debentures at a discount, and this power may be exercised by the directors where they have the general powers of the company (*v*); but the power of issuing debentures at a discount may be negatived or restricted by the articles of association or otherwise.

Debentures may be deposited by a company by way of mortgage to secure a loan of an amount less than the par value thereof with power for the depositor to sell them; the depositor or his assignee will be entitled on a winding up to prove for the

(*p*) *Ashbury Rail Co v Riche*, L R 7 H L 653

(*q*) *Guinness v Land Corp of Ireland*, 22 Ch D 349, 377, 381, C A

(*r*) *Harrison v Mexican Rail Co*, L R 19 Eq 358, *Re Phoenix Bessemer Co*, 44 L J Ch 638, *London Financial Assoc v Kelk*, 26 Ch D 107, 133, *Re South Durham Brewery Co*, 31 Ch D 261, C A, *Re Tisbury Portland Cement Co*, W N (1893) 141

(*s*) 25 & 26 Vict. c 89 See *Bryon*

v. Metropolitan Saloon, &c Co, 3 De G & J 123

(*t*) *Jackson v Ramford Coal Co*, (1896) 2 Ch 340

(*u*) *English Channel Steamship Co v Rolt*, 17 Ch D 715

(*v*) *Re Anglo-Danubian, &c Co*, L R 20 Eq 339, *Re Regent's Canal Ironworks Co*, 3 Ch D 43, C A, *Campbell's Case*, 4 Ch D 470 See also *Webb v Shropshire Rail Co*, (1893) 3 Ch 307, C A

full amount secured *pari passu* with the other debenture holders (x) CHAP XXVII

A company cannot issue fully paid bonus shares as an inducement to take up debentures, and the allottees will be liable to the full nominal value of the shares (y).

Where debentures were made redeemable at a premium if the company should be reconstructed, but otherwise at par, it was held that the condition must be strictly construed, and that on the amalgamation of the borrowing company with another company the debentures were redeemable at par (z).

If borrowing powers have been exceeded, and the transaction is void as against the company, the directors will be personally liable (a) Liability of directors for excessive exercise of powers

If directors borrow money expressly to "replace loans falling due," and they have at the time exhausted their powers, they are liable as for a breach of warranty (b), and so where a company has no power to accept bills, and the directors accept "on behalf of the company," they are personally liable (c), and if directors hold out an agent as authorized to borrow, they are personally liable (d); but an incorrect statement of a matter of law would not render the directors liable (e).

If directors sign a document borrowing money for the company, parol evidence is admissible to explain the ambiguity, whether their signature made them personally liable (f) Parol evidence, how far admissible

The power of borrowing money on behalf of a company is, according to the usual practice, vested by the articles of association in the directors (g). And by Article 55 of Table A appended to the Companies Act, 1862 (h), which is applicable to all companies limited by shares formed under the Companies Act except so far as excluded or modified by articles of association (i), a general authority is given to the directors to Borrowing powers exercisable by directors

(x) *Re Regent's Canal Ironworks Co*, 3 Ch D 43, C A

(y) *Re Railways Trusts Tables Co*, *Exp Welton*, (1895) 1 Ch 255, C A

(z) *Hooper v Western Counties, &c Telephone Co*, W N (1892) 148

(a) *Firbank's Executors v Humphreys*, 18 Q B D 54, C A. See *West London Commercial Bank v Kitson*, 13 Q B D 360, C A

(b) *Weeks v Propert*, L R 8 C P 127, *Whitehaven Joint Stock Banking Co v Reed*, 54 L T 360, C A

(c) *West London Commercial Bank v*

Kitson, 13 Q B D 360, C A

(d) *Chapleo v Brunswick, &c Co*, 6 Q B D 696, C A

(e) *Rashdall v Ford*, L R 2 Eq 750, *Eagleyfield v Marquis of Londonderry*, 4 Ch D 693, affirmed in H L 26 W R 540. See *Cargill v Bower*, 10 Ch D 516

(f) *McCullin v Gilpin*, 6 Q B D 516

(g) See *Exp Walker*, 18 Jur 885, *M'Lae v Sutherland*, 3 E & B 1

(h) 25 & 26 Vict c 89

(i) *Ibid*, ss 14, 15

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exercise the borrowing powers of the company, except so far as otherwise directed by statute or by the regulations of the company (l)

Mortgage by directors to one of themselves

There is no objection to a director advancing his own money to his company, and taking from it debentures or other security for the loan; and if debentures are issued at a discount to the public, a director may take them at such discount value (l)

Concurrent powers of company and directors

If a company has, by its memorandum of association, or by reason of the exigencies of its business, a power to borrow, which is by the articles exerciseable by an extraordinary general meeting, such power will not be restrained by a clause in the articles giving to the directors power to borrow only to a limited amount (m)

Ratification of *ultra vires* loan

If in such a case the directors exceed their authority, the company may, by ratifying the transaction, render it valid (n)

Loan before formation of company

So, also, though acts done before the formation of a company ~~causing reliance on such or principal and agent~~ ^{ratified}—for ratification implies an agent, and where there is no agent—yet a company may, after its formation, adopt such acts so as to bind itself. Thus a company may be bound by debentures issued by it Pursuant to an arrangement made on its behalf before its formation (o)

Ultra vires transactions not generally binding

iv.—Whether Securities which are *ultra vires* will bind Companies.—Generally a corporation created for particular purposes is not bound at law by a deed under the corporate seal, where by the express provision of, or necessary implication from, the statute which creates the corporation, the deed is *ultra vires* (p)

Ultra vires loans, when valid to extent of advances

But though a company may have no power to borrow money and the securities may be consequently void, yet if the monies advanced have been properly applied for the benefit of the company, the holders of the securities, whether directors or others, can recover such advances with interest (q). The prin-

(k) See *Spackman v Evans*, L R 3 H L 171, 244, *Re West of England Bank, Ex p Booker*, 14 Ch D 317, C A

(l) *Campbell's Case*, 4 Ch D 470 See *Southampton, &c Boat Co v Pinnoch*, 12 W R 330

(m) *Re Strand Music Hall Co*, 3 De G J & S 147

(n) *Irvine v. Union Bank of Australia*, 2 App Cas 366, *Grant v. United King-*

dom Switahback Co, 40 Ch D 135, C A

(o) *Howard v Patent Ivory Manufacturing Co*, 38 Ch D 156

(p) *South Yorkshire, &c Co v Great Northern Rail Co*, 9 Exch 55

(q) *Re Magdalena, &c Steam Co*, John 690, *Re Cork & Youghal Rail Co*, L R 4 Ch A 748, *Re German Mining Co*, 4 De G & M & G 19, *Re Norwich Yarn Co.*, 22 Beav. 143, *Troup's Case*,

uple of these cases is this : if the money is advanced for payment of debts recoverable, the persons advancing the money stand in the place of creditors; but the cases are not to be extended (r).

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Where a company having no borrowing powers raised money by sale of rolling stock to a waggon company, at the same time making a contract with the waggon company for the hire of the rolling stock at a rent which would repay the amount of the purchase-money with interest in five years, and for its repurchase at the expiration of that period at a nominal price, the transaction was upheld as *bond fide*, and, therefore, valid (s).

Sale and hiring of rolling stock

If directors issue debentures for their own benefit, not for that of the company, they will be liable to return any benefits received by them (t).

Debentures for benefit of directors

Where directors having power to raise money issued debentures in satisfaction of certain debts of the vendor of the business which the company was formed to take over under an agreement by the company to indemnify the vendor against such debts, amongst which was a debt due to the managing director of the company; it was held that under the circumstances the debentures were issued for the benefit of the company, and were accordingly valid (u).

Debentures issued in payment of debts taken over from founder

Where sums have been voted to promoters and directors, who take out the sums in debentures, the sums, being misappropriations, must be repaid, and the debentures will remain valid in the hands of holders without notice of the fraud (v).

The company are estopped from disputing irregular debentures if they are valid on their face and assignable (y), especially if the company have registered or accepted notice of the assignment thereof, or paid interest thereon (z), or have dealt with the assignee, or by asking for time (a). Where debentures have been issued irregularly, the company are estopped from setting

Estoppel

29 Beav 553, *Hoare's Case*, 30 Beav 225, *Baker's Case*, 1 Dr & S 55, *Re Beulah Park Estate*, L R 15 Eq 43, *International Life Ass Co*, L R 10 Eq 312 And see *Prince of Wales Ass Co v Harding*, 4 Jur N S 851

(r) *Re National Permanent, &c Soc*, L R 5 Ch A 309, 313 See *Re Lough Neagh Ship Co, Exp Workman*, (1895) 1 Ir R 533

(s) *Yorkshire, &c Waggon Co v Machine*, 21 Ch D 309, C. A.

(t) *London Trust Co v Mackenzie*, W N (1893) 9

(u) *Seligman v Prince & Co*, (1895) 2 Ch 617, C. A.

(v) *Re Anglo-French Co-operative Soc*, 21 Ch D 492, C. A.

(y) *Webb v Commissioners of Herne Bay*, L R 5 Q B 642

(z) *Brunton's Claim*, L R 19 Eq 302, *Re Northern Assam Tea Co*, L R 10 Eq 458, *Exp Chorley*, L R 11 Eq 157

(a) *Hulett's Case*, 2 J. & H 306.

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up the irregularity against holders for value without notice who have had them registered (*d*), and also against equitable transferees who had no reason to suspect any irregularity, but only to the extent of their *bonâ fide* advances (*e*)

Fraud of
director.

In one case, where debentures had been issued through the fraud of the managing director, and repudiated by the company as soon as the fraud was discovered, it was held that the company were entitled to repudiate the debentures, on the ground that the debentures in question were choses in action not assignable at law, so that the assignee could not stand in any better position than the original holder, and must take subject to the equities which affected the assignor (*f*); but the correctness of this decision has been questioned as regards the application to that case of the general rule on which it purported to be grounded (*g*)

The holders of valid debentures of a company are not estopped from disputing the validity of other debentures which have been improperly or irregularly issued (*h*).

Whether
lender must
require evi-
dence as to
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Where a company or its directors have power to borrow in manner provided by its articles, the lender may assume that all such preliminary acts as the passing of resolutions, &c., have been done as the deed of settlement or articles require; but where the statutory authority provides specially what shall be evidence of the performance of the preliminary acts, the lender must see that they are properly done (*i*)

Rule where
borrowing
powers are
limited as to
amount.

This rule, however, does not apply where the power of the company itself, as distinguished from that of its directors, is limited in point of amount; in such a case, the lender is not entitled to assume that the prescribed amount is not being exceeded (*k*); and if the company subsequently acquires further borrowing powers, it cannot by exercise of those powers, secure

(*d*) *Romford Canal Co v Carew's Claim*, 24 Ch D 85

(*e*) *Pocock's Claim*, 24 Ch D 85
See also *Shaw v Port Philip, &c Co*, 13 Q B D 103 (forged share certificate)

(*f*) *Official Manager of the Athenæum Life Ass Soc v Pooley, 3 De G & J 294* See also *Re Natal Investment Co*, L R 3 Ch A 355

(*g*) *Re Hercules Ins Co, Brunton's Claim*, L R 19 Eq 302, at p 312, per Mahns, V-C.

(*h*) *Mowatt v Castle Steel and Iron-works Co*, 34 Ch D 58, C A

(*i*) *Royal British Bank v Turguand*, 6 E & B 327, *Agar v Athenæum Life Ass Soc*, 3 O B N S 725, *Re Athenæum Life Ass Soc*, 4 K & J 549, *Fountainne v Carmarthen Rail Co*, L R 5 Eq 316, *Davies v Bolton & Co*, (1894) 3 Ch 678

(*k*) *Chapleo v Brunswick Building Soc*, 6 Q B D 696, C A, *Lady Wenlock v River Dee Co*, 10 App Cas 354

the previous advance, which was never a debt binding on the company (l) CHAP XXVII

The rule here referred to is thus explained by Lord Hatherley.—“Every joint stock company has its memorandum and articles of association. Those articles of association are open to all who are minded to have any dealings with the company, and those who so deal with them must be affected with notice of all that is contained in those documents. After that, the company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which, by its articles of association, it appears to possess; and all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and them only; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the articles of association” (m) Statement of the rule

Irregular securities, or securities for an illegal purpose, issued by a company to strangers without notice, may be enforced by them (n). So, where a company incorporated by special Act was empowered to borrow on mortgage such sums as might be from time to time authorized by a general meeting, not exceeding a specified amount, and issued debentures to an extent not exceeding that limit, but without the sanction of a general meeting, it was held that the proviso requiring such sanction was merely directory, and not one which it was obligatory on the debenture holders, in order to support their security, to show had been performed by the company (o). Bond fide holder for value may enforce irregular securities

So, where the directors of a company had power under the articles to fix a quorum, and by resolution fixed three as a quorum, and, at a meeting of the directors at which only two were present, the seal of the company was affixed to a mortgage, it was held that as between the company and the mortgagees who had no notice of the irregularity, the execution of the deed was valid (p). Quorum of directors

(l) See *Exp. Watson*, 21 Q. B. D. 301.

(n) *Mahony v East Holyford Mining Co.*, L. R. 7 H. L. 869, at p. 893. See *Ernest v Nicholls*, 6 H. L. C. 401, *Royal British Bank v Tinquand*, 6 E. & B. 327, *Biggenstaff v Rowatt's Wharf, Ltd.*, (1896) 2 Ch. 93, C. A.

(n) *Bryon v Metropolitan Saloon Co.*, 3 De G. & J. 123, *Fountaine v Car-*

marthen Rail Co., L. R. 5 Eq. 316, 322, *Re Marseilles Extension Rail Co.*, L. R. 7 Ch. A. 161.

(o) *Landowners, &c. Co. v Ashford*, 16 Ch. D. 412.

(p) *County of Gloucester Bank v Rudry, Methyn, &c. Coll. Co.*, (1895) 1 Ch. 629, C. A. See *Davies v Bolton & Co.*, (1894) 3 Ch. 678.

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(*h*) *Mowatt v Castle Steel and Iron-works Co*, 34 Ch. D 58, C A

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The rule here referred to is thus explained by Lord Hatherley —“Every joint stock company has its memorandum and articles of association. Those articles of association are open to all who are minded to have any dealings with the company, and those who so deal with them must be affected with notice of all that is contained in those documents. After that, the company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which, by its articles of association, it appears to possess; and all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and them only; subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the articles of association” (m) Statement of the rule

Irregular securities, or securities for an illegal purpose, issued by a company to strangers without notice, may be enforced by them (n). So, where a company incorporated by special Act was empowered to borrow on mortgage such sums as might be from time to time authorized by a general meeting, not exceeding a specified amount, and issued debentures to an extent not exceeding that limit, but without the sanction of a general meeting, it was held that the proviso requiring such sanction was merely directory, and not one which it was obligatory on the debenture holders, in order to support their security, to show had been performed by the company (o). Bondholder for value may enforce irregular securities

So, where the directors of a company had power under the articles to fix a quorum, and by resolution fixed three as a quorum, and, at a meeting of the directors at which only two were present, the seal of the company was affixed to a mortgage, it was held that as between the company and the mortgagees who had no notice of the irregularity, the execution of the deed was valid (p). Quorum of directors

(l) See *Exp Watson*, 21 Q B D 301.

(m) *Mahony v East Holyford Mining Co*, L R 7 H L 869, at p 893. See *Ernest v Nicholls*, 6 H L C 401, *Royal British Bank v Tinquand*, 6 E & B 327, *Biggs v Littlewoods*, (1896) 2 Ch 93, C A.

(n) *Bryon v Metropolitan Saloon Co*, 3 De G & J 123, *Fountaine v Car-*

marthen Rail Co, L R 5 Eq 316, 322, *Re Marseilles Extension Rail Co*, L R 7 Ch A 161.

(o) *Landowners, &c Co v Ashford*, 16 Ch D 412.

(p) *County of Gloucester Bank v Rudry, Menthay, &c Coll Co*, (1895) 1 Ch 629, C A. See *Davies v Bolton & Co*, (1894) 3 Ch 678.

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Informal and incomplete charges supported in equity.

In some instances, where resolutions of a company or of its directors have authorized a loan, but no formal or complete mortgage has been made, the Courts have held that the effect of the resolutions was to create valid equitable charges (*o*). But where there are no minutes authorizing the loan (*p*), or where the holder has notice of the irregularity (*q*), or where the resolution purporting to create the charge has not been communicated to the creditor (*r*), no charge is created.

Where the form given by the Act was not followed, the mortgage was notwithstanding valid against a creditor (*s*); and where certain formalities were required by the articles, a deposit of title deeds and a memorandum signed by the manager, though with authority, were held invalid; but the deeds were not ordered to be delivered up (*t*). And so the power, though informally exercised, has been held sufficient; as where directors were empowered to raise money by debentures, gave them to a contractor for the cost of work done, instead of issuing them to him for money and then handing him back the amount (*u*).

SECTION II

OF THE DIFFERENT KINDS OF SECURITIES GIVEN BY COMPANIES.

Companies' securities

i.—Mortgages, &c. by Companies generally.—The securities given by companies are mortgages, debentures, debenture stock, and bonds, the form, validity, and effect of which instruments depend upon and vary according to the powers under which they are issued, and the property, if any, included in each instrument (*x*).

(*o*) *Re Strand Music Hall Co*, 3 De G J & S 147, *Re General South American Co*, 2 Ch D 337, C A, Prince of Wales, &c Co v *Athenæum Ass Soc*, 1 E B & E 183, *Royal British Bank v Turquand*, 5 E & B 428, affirmed 6 E & B 327, *Agar v Athenæum Life Ass Soc*, 3 C B N S. 725

(*p*) *Re General Provident, &c Co*, 17 W R 514

(*q*) *Re Magdalena, &c Co.*, John. 690.

(*r*) *Re Wynn Hall Coal Co*, L R 10 Eq 515

(*s*) *M'Cormick v Parry*, 7 Exch 355

(*t*) *Re General Provident, &c Soc*, 17 W R 514 See *Exp National Bank*, L R 14 Eq 507

(*u*) *South Essex Gaslight Co*, 2 J & H 306, *Re Inns of Court, &c Co.*, L R 6 Eq 82

Shears v Jacob, L R 1 C P 513, approved, *Deffell v White*, L R 2 C P 144

(*x*) *Bryon v Metropolitan Saloon, &c Co.*, 3 De G & J. 123

A mortgage by a company does not differ, in point of form, from one given by an individual, except that if it is given to secure outstanding or future bills of exchange or promissory notes at maturity the covenant for payment of principal and interest should be omitted, so as to prevent the merger of the simple contract debts in a specialty security for the same debt (*y*)

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Form of mortgage by company

ii.—Debentures.—Generally speaking, a joint stock company, having under its memorandum of association express or implied power to borrow on mortgage, may by its articles or by special resolution empower itself to issue debentures to secure moneys advanced for the purposes of the undertaking, and authorize its directors to issue the same (*z*)

Power of company to issue debentures

By the Mortgage Debenture Act, 1865 (*a*), and the Mortgage Debenture Amendment Act, 1870 (*b*), companies which by their constitution are limited to the objects of advancing money on the securities upon land and other property in the Acts specified, or of borrowing money on transferable mortgage debentures on any such securities as aforesaid, are empowered to issue mortgage debentures in the form, and founded upon such securities, and to be registered as in the Acts mentioned (*c*)

Statutory powers of loan companies

No precise legal definition of the expression "debenture" has been given by any statute or reported judicial decision. "It is not either in law or in commerce a strictly technical term, or what is called a term of art" (*d*). The expression occurs in several statutes, and has given rise to decisions as to its meaning for the purposes of the particular Act. Thus, it has been held that an instrument, though not purporting to be a debenture, may be a "debenture" for the purposes of the Bills of Sale Act, 1882, so as not to require registration (*e*); and it would seem that, generally speaking, an instrument creating a charge on the property of a company may be treated as a debenture, though not expressly purporting to be such (*f*).

Meaning of term "debenture"

(*y*) See Key & Elph Conv Prec, 5th ed vol ii, pp 158, 162, Byth & Jarm Conv 4th ed vol iii p 1117 See Dav Conv vol ii pt ii p 608, n See as to merger, Price v Molton, 10 C B 561, Owen v Homan, 3 Mac & G 407.

(*z*) Bryon v Metropolitan Saloon, &c Co, 3 De G & J 123, Re Inns of Court Hotel Co, L R 6 Eq 82, Re Panama, &c Co, L R 5 Ch A 322, Howard v Patent Ivory Co, 38 Ch D 156.

(*a*) 28 & 29 Vict c 78, s 3

(*b*) 33 & 34 Vict c 20, s 4

(*c*) Post, p 500

(*d*) Per Chitty, J, in Levy v Abercorris Co, 37 Ch D 260, at p 264 See British India, &c Co v Commissioners of Inland Revenue, 7 Q B D 165, 172, Edmonds v Blarna Furnaces, 36 Ch D 215, 219

(*e*) Levy v Abercorris Co, sup

(*f*) See Enthoven v. Hoyle, 21 L J

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Conversely, it was held that an instrument purporting to be a debenture was chargeable as such with stamp duty, though it was in effect a mere promissory note, which is not ordinarily regarded as a debenture (*g*)

Debenture
need not be
under seal

Debentures are usually given under seal, but this is not essential to their validity, if the articles empower the directors to issue debentures under hand only signed by some of their number (*h*)

Single debenture

Debentures are usually issued in a series, entitling each holder to rank *pari passu* with other holders forming part of the same series; but a debenture may be a single instrument (*i*)

Meaning of
"issue"

Debentures are "issued" when they are delivered, so as to give the holder the right to deal with them (*k*)

Mortgage
debentures
and simple
debentures

Debentures are of two kinds, namely, mortgage debentures, which are charges of some kind on property, and debentures, which are mere bonds either simply amounting to an acknowledgment of indebtedness, or coupled with an undertaking to pay the principal and interest thereon till payment (*l*)

How charge
created

The charge on property by which a mortgage debenture is secured may be created by a separate covering deed of trust, or by the debenture itself, or partly by a trust deed and partly by debentures

Trust deeds
to secure
debentures

Debenture trust deeds are executed where it is desired that the legal estate in the property charged shall pass to trustees so as to ensure the priority of the security, and so as to enable them to protect the interests of the debenture holders, and in the case of default to enter and sell, &c, without any application to the court. Trust deeds are usually considered advisable in the case of charges upon ships, letters patent, and where debenture holders are to have the option of exchanging debentures to bearer for registered debentures and *vice versa*. The practice of issuing debentures covered by a trust deed is more common than formerly, as it is found that debentures so secured are attractive to investors.

Debentures

Trust deeds are also often thought advisable to secure debentures

C P 100, *Gardner v L C & D Rail Co*, L R 2 Ch A 201

(*g*) *British India, &c Co v Commissioners of Inland Revenue*, 7 Q B D 165

(*h*) *Ibid*

(*i*) *Levy v Abercrombie Co*, 37 Ch D 260, *Robson v Smith*, (1895) 2 Ch 118

(*k*) *Mowatt v Castile Steel, &c Co*, 34 Ch D 58, 62, C A See *Re Brucham*, (1895) 2 Ch 786, C A

(*l*) See *per Lindley, J*, in *British India, &c Co v Commissioners of Inland Revenue*, 7 Q B D 165, p 172

tures issued by companies carrying on business abroad, and intended to be charged on land in a foreign country Trusts declared by such deeds will be enforced by the English Courts against the trustees and the company (m), according to the well-settled rule that equity, as it acts primarily *in personam*, and not merely *in rem*, may enforce, as between persons residing within the jurisdiction, trusts affecting land situate out of the jurisdiction (n). It must, however, be borne in mind that trusts are not recognized by the laws of many foreign countries, and accordingly the difficulties may arise and expense be incurred incident to the devolution of the property comprised in the security; and, moreover, if debentures are charged on land in a foreign country otherwise than in accordance with the laws of that country, although the Court here will as far as possible enforce the contract according to English law, and without regard to the law of the foreign country (o), yet the omission of formalities required by the law of that country for the validity of the charge may nullify, wholly or in part, the practical effect of the decision of an English Court

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charged on
foreign land

A trust deed to secure debentures is usually framed in the form of a conveyance or assignment to trustees for the debenture holders of the property intended to be comprised in the security upon trust to permit the company to carry on its business until default, and thereupon to enter and sell, &c, and it frequently contains power for the trustees, on default and upon sale, to carry on the business for the benefit of the shareholders (p)

Form of trust
deed

A trust deed to secure debentures may contain a proviso that the trustees shall have the statutory powers of sale and appointing a receiver, &c, in like manner as if they were mortgages, and such powers will be exerciseable accordingly (q)

Powers of
sale

Where the payment of debentures is secured by a covering trust deed, a general condition in the deed that a resolution carried by a majority at a meeting shall bind all the debenture holders is valid so as to enable a meeting by the specified

Power for
majority to
bind all de-
benture
holders

(m) See *Holroyd v Marshall*, 10 H L C 191

(n) *Penn v Baltimore*, 1 Ves Sen 444
See *S C*, and notes thereto in Tudor,
L C Eq 1047 See also *Ewing v
Orr-Ewing*, 9 App Cas 40, *Mercantile,
&c Co v River Plate, &c Co*, (1892) 2
1 Ch 303

(o) *Exp Pollard*, 4 Deac. 27, *Exp
Holtkaussen, Re Scheibler*, L R 9 Ch
A 722

(p) For forms of trust deeds, see
Palmer's Company Precedents, 6th ed
pt 1, pp 702 *et seq*

(q) See *Owen & Co v Cronk*, (1895)
1 Q B 265, C A

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majority to assent to any modification consistent with the provisions of the deed. So, where the trust deed provided that a meeting of the debenture holders should have power, by resolution passed by a certain majority, "to sanction any modification or compromise of the rights of the debenture holders against the company or against its property," so as to bind all debenture holders, whether present or not, it was held that a resolution duly passed and carried by the requisite majority sanctioning a loan to the company, and resolving that such loan should take priority over the existing debentures, was a resolution for a "modification" of the rights of the debenture holders within the meaning of the trust deed, and therefore valid and binding on a dissentient minority (*r*)

Extent of
power of
majority

But the power of a majority to bind the minority of the debenture holders must be clearly expressed, and its limits defined in detail; for the assent of the majority will not be binding except in strict accordance with the terms of the power (*s*); nor will it bind the minority to anything inconsistent with the provisions of the deed (*t*), or if the objects of the trust have failed (*u*)

Operation of
trust deed
where no
debentures
issued

Where a trust deed is executed to cover debentures intended to be issued, the issue of debentures is an absolute condition precedent to the deed becoming a security. Until they have been issued its only operation is by way of conveyance to the trustees of the legal estate in trust for the company (*x*) to obtain a

Debentures
by covenant
with named
person

Formerly debentures were generally framed so as to constitute a covenant by the company with the person to whom each debenture was issued to pay to him, his executors, administrators or assigns, the principal and interest thereby secured; but this form was found to cause serious inconvenience. A debenture being a chose in action the right to sue upon the covenant was only assignable in accordance with the rules governing the assignment of choses in action in equity, thereby necessitating an investigation of the assignor's title and other precautions and

(*s*) *Follis v Eddystone Granite Quarries*, (1892) 3 Ch 75. See *Re Dominion of Canada, &c Co*, 55 L T 347, *Sneath v Valley Gold, Limited*, (1893) 1 Ch 477, *Mercantile Investment, &c Trust Co v River Plate Trust, &c Co*, (1894) 1 Ch 578, *Finlay v Mexican Investment Corp*, (1897) 1 Q B 517.

(*t*) *Mercantile Investment Trust Co v International Co of Mexico*, (1893) 1 Ch

484, C A.

(*u*) *Hay v Swedish and Norwegian Rail Co*, W N (1889) 96, C A.

(*x*) *Collingham v Sloper*, (1893) 2 Ch 96, this decision was appealed from, but a compromise was sanctioned by C A. See *S C*, (1894) 3 Ch 716.

(*y*) *Re Bircham*, (1895) 2 Ch 786, C A.

formalities, which often occasioned considerable trouble and expense. CHAP XXVII

The person entitled to such equities may release them, either expressly, or by implication arising from his course of conduct; and, accordingly, where a holder of certain debentures, who held shares in the company which were not fully paid up, transferred his debentures, and the transferees were registered as the proprietors of the debentures, and received certificates to that effect from the company, it was held that the company had, by their conduct, released their lien for unpaid calls against the transferees (y) So, the acceptance of notice of an assignment of a bond, given at the office, was held to preclude the company from setting up against the assignee equities between them and the original obligor though the assignment was never registered (z)

Release of
equities

The forms of debentures now commonly used are registered debentures and debentures to bearer. Modern forms
of debentures

A registered debenture contains a promise by the company to pay the named person to whom it is issued, "or other the registered holder," the principal and interest secured, and also, if such is the intention, a charge upon property of the company intended to be comprised therein Registered
debentures

The register of holders being evidence of title, this form offers the advantages of enabling the debenture to be dealt with, both as between the original holder and the transferee, and also as between the registered holder for the time being and the company, without the necessity for investigation of title and of rendering the debenture transferable free from equities affecting the original holder Advantages
of debentures
in this form

Registered debentures are sometimes framed so as to render the principal payable only to the registered holder for the time being, but the interest payable to the bearer of coupons attached to the debenture This is often found convenient and acceptable to trustees and others, who may be unable or unwilling to run the risk of lending money on securities by which the principal is made payable to bearer Registered
debentures
with coupons

Debentures are now frequently issued payable to bearer, either simply or so as to be capable of subsequent registration at any time, with the object of making them, as far as possible, freely transferable by delivery as negotiable instruments, with- Debentures to
bearer

(y) *Re Northern Assam Tea Co*, L R 10 Eq 458

(z) *Re Hercules Insurance Co*, *Brunton's Claim*, L R 19 Eq 302

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out any necessity for a written assignment, and so as to enable the *bonâ fide* holder for value, for the time being, to sue the company in his own name, and to confer upon him a good title free from intervening equities.

Negotiability
of debentures
to bearer

How far debentures to bearer are to be deemed to be negotiable instruments, so as to confer on a person taking them in good faith and for value a good title, though he takes from one who has no title, appears to be a question not free from doubt. As regards debentures issued since the Bills of Exchange Act, 1882 (*a*), such instruments, though under seal, may, if so framed as to fall within the definition of a "promissory note" in sect. 83 of that Act, operate as such, and be negotiable accordingly (*b*). But many debentures are so framed as not to fall within that definition, and it is with regard to these that the difficulty arises. The question depends mainly upon whether there is such an established usage to treat debentures to bearer as negotiable as to render them, like instruments which are negotiable by the law merchant, an exception to the general rule of law and equity, that no person can acquire a good title either to a chose in action or any other property from one whose title is defective.

Crouch v.
Credit Foncier
of England

The only reported case amounting to an actual decision on the point is that of *Crouch v. Credit Foncier of England* (*c*), in which the negotiability of debentures to bearer, not being promissory notes, was negatived, on the ground that, such instruments being of only recent introduction, the custom could not be part of the law merchant, of which the Court is bound to take notice.

Goodwin v.
Roberts

The authority of this case is considered (*d*) to have been shaken by the decision of the Court of Exchequer Chamber in *Goodwin v. Roberts* (*e*), in which case it was held that scrip issued in England by the agent of a foreign government, entitling the bearer to delivery of formal bonds of the government, were negotiable instruments passing by delivery to a *bonâ fide* holder without notice. Sir A. Cockburn, C. J., in delivering the judgment of the Court, gave a full and exhaustive examination of the origin and history of negotiable instruments, and observed: "We think the judgment in *Crouch v. Credit Foncier*, may well be supported on the ground that, in that case, there

(*a*) 45 & 46 Vict. c. 61. Secs. 90 (2).

(*b*) *Re Imperial Land Co. of Marseilles*,
L. R. 11 Eq. 478.

(*c*) T. R. 8 Q. B. 274.

(*d*) See Palmer, Comp. Prec. 620,
Chadwyck Healey on Companies, 174.
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was substantially no proof whatever of general usage. We cannot concur in thinking that, if proof of general usage had been established, it would have been sufficient ground to give effect to it that it did not form part of what is called the ancient law merchant." But on appeal to the House of Lords (f), their lordships, though they affirmed the decision of the Exchequer Chamber, expressly distinguished the case before them from the case of *Crouch v Credit Foncier Co*, and abstained from casting any reflection on the decision in that case.

In the more recent case of *Easton v London Joint Stock Bank* (g), the question was whether certain foreign bonds to bearer, deposited as securities for a loan, and handed over by the depositor to a bank as a security for a loan to himself, were to be taken as negotiable securities, so as not to affect the bank with the equities of the original owner; and evidence was adduced that on the market in the City of London, as a matter of fact, these bonds were dealt with as negotiable. The Court of Appeal held that, though the bonds were not strictly negotiable, yet that, as the bank had taken them for value without notice, they must be treated as such, as between the parties. Sir C Bowen, L J, in his judgment (h), observed: "One must be careful to see that one is not ascribing to the commercial world a custom or habit which prevails only in a particular market or particular section of the commercial world, and before one draws the broad inference which was drawn by consent, be it observed, in the case of *Goodwin v Roberts* (i), I should hesitate, and ask myself whether the thing had been thoroughly thrashed out, and whether the true inference to be taken on the evidence as a whole, and viewed by the light of strict commercial law, was not, perhaps, that these bonds were treated as negotiable in a certain class of the commercial world, without actually rising to the level of documents which the commercial world in general treated as negotiable by the law merchant." This decision was reversed by the House of Lords upon the ground that, in point of fact, the bank was not a purchaser for value without notice, but without going into the question whether the securities were negotiable or not (k).

*Easton v
London Joint
Stock Bank.*

During the period of more than twenty years that have Custom of bankers.

(f) 1 App Cas 476
34 Ch D 95
1) *Ibid*, at p 113

(i) 1 App Cas 476
(k) *Earl of Sheffield v London Joint
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(*e*) L. R. 10 Ex. 337, at p. 356.

was substantially no proof whatever of general usage. We cannot concur in thinking that, if proof of general usage had been established, it would have been sufficient ground to give effect to it that it did not form part of what is called the ancient law merchant." But on appeal to the House of Lords (*f*), their lordships, though they affirmed the decision of the Exchequer Chamber, expressly distinguished the case before them from the case of *Crouch v. Credit Foncier Co.*, and abstained from casting any reflection on the decision in that case.

In the more recent case of *Easton v. London Joint Stock Bank* (*g*), the question was whether certain foreign bonds to bearer, deposited as securities for a loan, and handed over by the deposittee to a bank as a security for a loan to himself, were to be taken as negotiable securities, so as not to affect the bank with the equities of the original owner; and evidence was adduced that on the market in the City of London, as a matter of fact, these bonds were dealt with as negotiable. The Court of Appeal held that, though the bonds were not strictly negotiable, yet that, as the bank had taken them for value without notice, they must be treated as such, as between the parties. Sir O. Bowen, L. J., in his judgment (*h*), observed: "One must be careful to see that one is not ascribing to the commercial world a custom or habit which prevails only in a particular market or particular section of the commercial world, and before one draws the broad inference which was drawn by consent, be it observed, in the case of *Goodwin v. Roberts* (*i*), I should hesitate, and ask myself whether the thing had been thoroughly thrashed out, and whether the true inference to be taken on the evidence as a whole, and viewed by the light of strict commercial law, was not, perhaps, that these bonds were treated as negotiable in a certain class of the commercial world, without actually rising to the level of documents which the commercial world in general treated as negotiable by the law merchant." This decision was reversed by the House of Lords upon the ground that, in point of fact, the bank was not a purchaser for value without notice, but without going into the question whether the securities were negotiable or not (*k*).

*Easton v.
London Joint
Stock Bank.*

During the period of more than twenty years that have Custom of bankers.

f) 1 App. Cas. 476
34 Ch. D. 95
1) *Ibid.*, at p. 113

g) 1 App. Cas. 476
h) *Earl of Sheffield v. London Joint
Stock Bank*, 13 App. Cas. 333.

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elapsed since the decision in *Crouch v. Credit Foncier Co*, it may be that the practice of treating debentures and bonds to bearer as negotiable has extended, and it is believed that most of the leading banks are in the habit of regarding them as such (*l*); but it may be doubted, having regard to the observations of Sir C Bowen, L J, above cited, whether evidence of this fact would be sufficient to induce the Court to treat such instruments as strictly speaking negotiable

Evidence of
custom of
Stock
Exchange
admitted

In two recent cases (*m*), it has been held that bonds to bearer, issued by foreign companies, were negotiable instruments, upon clear evidence that they were commonly dealt with as such on the Stock Exchange; and in one of these cases it was held that it is not necessary to prove the custom with regard to the securities of the particular company, but that it is sufficient to prove that like bonds issued by similar companies are commonly treated as negotiable securities on the Stock Exchange (*n*). But these decisions do not seem by any means to establish any general rule that debentures to bearer are to be deemed to be negotiable instruments

The question
must be
decided by
English law

It is to be observed that the question as to the negotiability of instruments must be decided by English law, so that proof that a particular class of instruments issued in a foreign country are negotiable by the law of that country will not make them negotiable instruments in this country (*o*)

Debentures
must be made
transferable
free from
equities of
company

But, whether or not it shall be judicially decided that debentures to bearer, not being promissory notes, are to be deemed, as a general rule, to be negotiable instruments (*p*), there can be no doubt that, as between the company and the holder for the time being, such debentures may be so framed as to render them transferable free from equities of the company. This proposition is thus laid down by Lord Cairns in *Re Agia and Masterman's Bank, Ex parte Asiatic Banking Co* (*q*) — “Generally speaking a chose in action assignable in equity must be assigned subject to the equities existing between the

(*l*) Palmer, Comp Proc 620

(*m*) *London Joint Stock Bank v Simmons*, (1892) A C 201, *Venables v Baring Brothers*, (1892) 3 Ch 527. See also *Bentnck v London Joint Stock Bank*, (1893) 2 Ch 120, *Stern v Reg*, (1896) 1 Q B 211

(*n*) *Per Kekewich, J*, in *Venables v Baring Brothers*, *sup*, at p 540

(*o*) *Pecker v London and County*

Banking Co., 18 Q B D 515, C A, *Colonial Bank v Cady and Williams*, 15 App Cas 267

(*p*) See further on this point Chadwyck Healey on Companies, 174, 175, Palmer, Comp Proc 620 *et seq*

(*q*) L R 2 Ch A 391, at p 397. See also *per Rolfe, L J*, in *Re Blakely Ordinance Co*, L R 3 Ch A at p 159

original parties to the contract, but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities."

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This exception appears to be founded on the doctrine of estoppel. Where a company issues a debenture framed in such a manner as to amount to a representation that, in return for valuable consideration received, it will perform certain conditions, expressed in or to be implied from the debenture, the company is by this doctrine precluded from repudiating the conditions while retaining the benefit, but will be bound to perform them as between itself and any person acting on the faith of those conditions (1).

Estoppel

Moreover, it has been held that a company, like an individual, may be bound by an offer addressed to any person who will perform certain acts deemed to be for its benefit, and may by the terms of the offer make the performance of the acts a sufficient acceptance without notification (2).

Contracts by
"advertisement"

Debentures may accordingly be so framed as that, though they may not be in strictness negotiable securities, so as to exclude in favour of the bearer for the time being the equities of prior holders, yet they may possess many of the advantages incident to such instruments

Advantages
of debentures
to bearer

Where debentures are made payable to bearer, it would seem that the nature of the contract will generally be taken to indicate an intention that they shall be transferable free from the equities affecting them (3). But the case may be otherwise if the debentures are framed so that the contract is in the alternative with a named person or to bearer (4).

Transfer free
from equities

It is well settled that debentures issued to bearer may stipulate that the company will recognize the bearer as owner, without requiring him to prove his title by producing any written assignment (5).

Transfer
without
writing

(1) *Re Bahia and San Francisco Rail Co*, L R 3 Q B 584, *Webb v Herne Bay Commissioners*, L R 5 Q B 642, *Re Agra and Masterman's Bank*, L R 2 Ch A 391, *Carr v L & N W Rail Co*, L R 10 C P 307, *Goodwin v Roberts*, 1 App Cas 476, *Balkis Co v Tomkinson*, (1893) A C 396.
(2) *Williams v Carwardine*, 4 B & Ad 621, *Carhill v Carbolac, & Co*, (1893) 1 Q B 256. See also *Re Agra*

and *Masterman's Bank*, L R 2 Ch A 391.

(3) *Re Blakely Ordnance Co*, L R 3 Ch A 154, *Re Natal Investment Co*, L R 3 Ch A 355, 361.

(4) See *Re Natal Investment Co*, *sup*, *Re Imperial Land Co of Marseilles, Exp Colborne*, L R 11 Eq 487. See also *Chadwyck Healey, Comp Law & Pr* 176, but see *Re Blakely Ordnance Co*, *sup*.

(5) *Re Blakely Ordnance Co*, *sup*, at

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Discharge to company by delivery

Whether bearer may sue in his own name

Remedy, where debentures are secured by a trust deed, is through the trustees.

Distinction where the debentures create direct contract with holders

Debentures in blank

The delivery of the debentures or of interest coupons may be made a good discharge to the company for moneys paid thereon, if such is the nature of the contract between the parties (y).

At law, the holder of a debenture to bearer, not being a promissory note or other negotiable instrument, cannot sue the company in his own name on the debenture, though the instrument may be evidence of the debt, so as to enable him to recover (z). But in equity a different rule prevails, and a debenture to bearer will entitle the holder for the time being, as equitable assignee of the contract, to the full benefit thereof, so as to enable him to sue thereon in his own name (a).

Where a trust deed to secure certain debentures to bearer issued by a company contained a covenant with the trustees to pay to them the interest, and to provide by a sinking fund for the gradual discharge of the debentures, and each debenture contained a covenant with the trustees to pay 100% to the bearer thereof, and interest to the bearer of the coupons annexed thereto, it was held that neither the bearer of a debenture, as to principal, nor the bearer of a coupon, as to interest, was a creditor of the company, either at law or in equity, so as to be entitled to present a winding-up petition, but that his only right of action was through the trustees (b).

Where, however, debentures were secured by a trust deed containing a similar covenant with the trustees, but each debenture contained a general undertaking to pay the principal and interest subject to indorsed conditions, one of which was that the bearer of the debenture and bearer of each of the coupons should be entitled to the principal and interest respectively, it was held that there was a direct debt from the company, so that the holder of a debenture might present a petition to wind up the company (c).

Debentures are sometimes issued left with a blank for the name of the holder, so as to render them transferable by de-

p 159, *Re Natal Investment Co*, L R 3 Ch A 355, at p 360 See *Higgs v Northern Assam Tea Co*, L R 4 Ex 387, 394

(y) *Crouch v Credit Foncier of England*, L R 8 Q B 385, *Re Natal Investment Co*, L R 3 Ch A 355

(z) *Crouch v Credit Foncier of England*, sup See per Lord Cottenham in

Squire v Whetton, 1 H L C 333

(a) *Re Blakely Ordnance Co*, L R 3 Ch A 154

(b) *Re Uruguay Central Rail Co*, 11 Ch D 372 See *Re Empress Engineering Co*, 16 Ch D 125, C A, *Gandy v Gandy*, 30 Ch D 57, C A

(c) *Re Olathe Silver Mining Co*, 27 Ch D 278

livery by way of assignment or deposit as security with a view of enabling the holder for the time being to insert the name of himself or a nominee, and to register the person whose name is filled in as owner of the debenture.

Where a company issued debentures purporting to charge property as security for a loan, and delivered them to the lenders with blanks left for the obligee, it was held that the holders had in equity a good charge as against the company, notwithstanding that the debentures were void at law (*d*); and in a recent case, where some of a series of debentures were issued to persons named therein, and others were issued in blank and deposited with a bank as security for a loan, it was held, in an action to administer the trusts of a covering deed made to secure the debentures, that the bank were entitled to the full benefit of the trusts to the amount of their loan *pari passu* with the other debenture holders (*e*).

Debentures may be either terminable or perpetual. Terminable debentures may be made payable at a stated time or by drawings at stated periods. A provision in a debenture accelerating the time for payment if default should be made in payment of interest is not a penalty against which equity can relieve. Independently of any such provision, the holder of a debenture which has not matured may, on the winding up of the company, at once enforce his security for the full amount of his principal, interest, and costs (*f*).

Terminable
and perpetual
debentures

The intention that a debenture shall be perpetual, that is to say, payable only on default in payment of interest or on the winding up of the company, must be clearly expressed. If merely no date is fixed for payment of the principal, the debenture holder will be entitled to enforce his security upon non-payment by the company after six months' notice at any time (*g*).

Interest continues to run on a debenture after it falls due, although not expressly provided for (*h*); but it is a question of discretion. The rule against payment of dividends on shares

Interest on
debentures

(*d*) *Re Strand Music Hall Co*, 1 De G J & S 147

(*e*) *Re Queensland Land and Coal Co*, (1894) 3 Ch 181

(*f*) *Hodson v Tea Co*, 14 Ch D. 859, *Wallace v Universal Automatic Machines Co*, (1894) 2 Ch 547, C A

(*g*) *Hopkins v Worcester, & Co Canal Proprietary*, L R 6 Eq 437. See *Exp Delhasse*, 7 Ch D 511, C A

(*h*) *Price v G Western Ry*, 16 M & W 244, *Morgan v Jones*, 8 Exch 620, *Gordillo v Weguelin*, 5 Ch D 303

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before any profits are realized does not apply so as to render improper the payment of interest on debentures (*i*)

Coupons.

There seems no practical objection to annexing coupons for the interest of debentures (*k*) And these coupons, being mere tokens, require no stamp (*l*)

Power to borrow on debenture stock generally

iii.—Debenture Stock.—Where companies have the power to raise money by mortgage or bond they may do so by debenture stock (*m*), and to the extent of the stock so issued the borrowing powers are to be extinguished (*n*) Such stock is a charge on the undertaking, and is transferable and transmissible (*o*) No rate of interest is now prescribed (*p*).

Power of railway companies to issue debenture stock

Similar powers as to debenture stock are given to railway companies (*q*), and thus even though the special Act does not expressly incorporate Part III. of the Companies Clauses Act, 1863 (*r*) In order to check the issue of debentures beyond the powers of the railway company, a declaration must be indorsed upon each mortgage bond or certificate of debenture stock specifying the powers under which the securities are issued (*s*), but with a proviso that nothing in the Act is to affect the liability of the company to third persons (*t*) Debenture stock of a railway company does not give to the holders any charge which they did not possess before the Act over the proceeds of sale of surplus lands (*u*).

Nature of security created by debenture stock

It is to be observed that the raising of money by the issue of debenture stock differs materially in its incidents from the contracting of a loan on mortgage or debentures Debenture stock creates no debt except as to the interest, inasmuch as the capital cannot be called in by the creditor, and cannot be paid off, unless, as is sometimes the case, the stock is issued subject to redemption at the option of the company There is no conveyance or assignment of anything to the stockholder, or to a trustee for him; the holder is merely entitled to a right

(*i*) *Blozam v Metropolitan Rail Co*, L. R. 3 Ch A 337

(*k*) *Dav Conv* (4th ed) vol 11 p 2, p 683, and *Bowen v Brecon Rail Co*, L. R. 3 Eq 541

(*l*) *Enthoven v Hoyle*, 18 C B 373
Coupons on debentures payable abroad are liable to income tax See *Alexandra Water Co v Musgrave*, 11 Q B D 174, C A

(*m*) *Comp. Cl Act*, 1863 (26 & 27 Vict c. 118), s 22, and 32 & 33 Vict

c 48, s 3

(*n*) 26 & 27 Vict c 118, s 22

(*o*) *Ibid*, s 23

(*p*) 32 & 33 Vict c 48, s 1, repealing part of 26 & 27 Vict c 118, s 22

(*q*) 30 & 31 Vict c 127, ss 24, 25

(*r*) *Re Mersey Rail Co* (No 1), (1895) 2 Ch 287, C A

(*s*) 29 & 30 Vict c 108, s 14

(*t*) *Ibid*, s 18

(*u*) *Re Hull, &c Rail and Dock Co*, 40 Ch D 119, C A.

to a perpetual annuity payable out of the concern in priority to the holders of all other stock or shares. Debenture stock is, indeed, nothing but preference stock with a special preference (*x*)

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iv.—Bonds.—A bond, unless by its terms specifically made so, is no charge on the property of a company (*y*); but bonds charging “all the estate, property, and effects” of the company, expressed to be made under a power in the articles of association authorizing the borrowing of money on the property of the company by debentures, were held to create a valid charge on the property (*z*)

Bonds of companies

It is not clear whether the charge would have been upheld if the bonds had not expressly referred to the power (*a*).

Lloyds’ bonds are instruments under seal, amounting to an account stated, and containing a promise to pay, but not creating any charge on the property of a company. If given for money lent, they are invalid (*b*). But if given for money due to a contractor, or the like, and generally, they will be enforced, so far as the company has had the benefit of the money (*c*)

Lloyds’ bonds

v.—Contracts to issue and take Debentures, &c.—A definite contract by a company to issue debentures or debenture stock charged on property of the company gives to the persons entitled to the benefit of the contract as good a claim and as effectual a security in equity as if the debentures or debenture stock had been actually issued pursuant to the agreement (*d*).

Agreement to issue debentures

Specific performance of an agreement to give a charge on specified property may be enforced against a company, as against an individual, if the money has been actually advanced, but not otherwise (*e*)

Specific performance

(*x*) *Attree v Hawe*, 9 Ch D 337, at p 349

(*y*) *Russell v E Anglian Rail. Co*, 3 Mac & G 104, 125, *Imperial Mercantile, &c Assoc v Newry, &c Rail Co*, 1r R 2 Eq 524, *Norton v Florence, &c Co*, 7 Ch D 332

(*z*) *Re Florence Land, &c Co*, 10 Ch D 530, C A at p 536

(*a*) *Re Florence Land, &c Co*, *sup*

(*b*) *Chambers v Manchester, &c Co*, 5 B & S 588, *Fountaine v Carmarthen Rail Co*, 1r R 5 Eq 316

(*c*) *White v Carmarthen, &c Ry*,

1 H & M 786, *Re Cork and Youghal Rail Co*, 1r R 4 Ch A 748, *Dickson v Swansea Vale, &c Rail. Co*, 1r R 4 Q B 44, *Blackburn, &c. Soc v Cunliffe*, 22 Ch D 61, C A, affirmed in H L, W N (1884) 183

(*d*) *Re Queensland Land and Coal Co*, (1894) 3 Ch 181. See *Re Strand Musico Hall Co*, 3 De G J & S 147, *Mercantile Investment Co v River Plate Trust*, (1892) 2 Ch 303

(*e*) *Ante*, p 48

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Conversely, specific performance will not be enforced against a person who has agreed to take debentures as security for an advance to be made by instalments, so as to compel him to pay up his instalments pursuant to the agreement, the remedy of the company in such a case is by damages (*f*). The measure of the damages is the loss sustained by the breach of contract, not by the amount agreed to be advanced (*g*).

Payment of
instalments
of loan

A subscriber is in no way bound to continue the payment of his instalments after a company goes into liquidation (*h*), or if he has notice that the company is insolvent (*i*), or apparently that the particular object for which the money is intended to be advanced has become impracticable (*j*)



SECTION III.

WHAT SUBJECT-MATTER MAY BE INCLUDED IN SECURITIES GIVEN BY COMPANIES

Distinction
between com-
panies for
public pur-
poses and
ordinary
companies

i.—Undertaking, Tolls, Surplus Lands, &c. of Railway and Public Companies.—With regard to the subject-matter which may be included in securities given by companies, a distinction is to be drawn between companies having, to a greater or less degree, a monopoly in providing public traffic, or carrying out other objects in which the community is interested, and companies formed for purposes of private adventure and profit (*k*)

Railway can-
not mortgage
permanent
way

On grounds of public policy, the permanent way of a railway company cannot be mortgaged, or sold, or dealt with in any way (*l*)

Meaning of
“under-
taking” of
railway, &c.
companies.

The question as to what is included in mortgages of the “undertaking” of railway and other companies has frequently come before the Courts for decision. In the Lands Clauses Act, 1845, s 2 (*m*), the “undertaking” means “the under-

(*f*) *Western Wagon Co. v West*, (1892) 1 Ch 271

(*g*) *South African Territories v Walington*, (1897) 1 Q B 692, C A

(*h*) *Re Ellerby*, 20 W R 855

(*i*) *Exp Chalmers*, L R 8 Ch A 289, *Re Phoenix Bessemer Steel Co*, *Exp Curnforth Co*, 4 Ch D 108, C A

(*j*) See *Wilson v Church*, 13 Ch D 1, C A, *National Bolivian Navg Co v Wilson*, 5 App Cas 176, *Gillingham v Soper*, (1893) 2 Ch 96, reversed on

other grounds, (1894) 3 Ch 716, C A

(*k*) As to the obligations and restrictions on railway companies having reference to the interests of the public, see *Great Northern Rail Co v Eastern Counties Rail Co*, 9 Ha 306, 310

(*l*) *Re Panama, &c Royal Mail Co*, L R 5 Ch A 318, 321, *Gardner v London, Chatham and Dover Rail Co*, L R 2 Ch A 201, *Bagnalstown Rail Co*, Ir R 1 Eq 275

(*m*) 8 & 9 Vict c 18

taking or works, of whatever nature, which should by the special Act be authorized to be executed"; in the Railway Clauses Consolidated Act, s 2 (u), it signifies, "the railway and works."

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A mortgage of the "undertaking" of a railway company passes the rails, stations, and other buildings and works (o); but does not include the soil of the railway (p), or surplus lands, or the proceeds of sale thereof (q), or the rolling and other stock or property of the company as carriers (r).

Mortgage of undertaking of railway company

But a specific charge may be made of surplus lands (s). It can, however, be made only subject to the right of pre-emption in the adjacent owners (t).

Mortgage of surplus lands

The word "undertaking," in the case of a railway company or other company of a public nature, means the undertaking as a going concern, and, accordingly, the mortgagee cannot interfere with the management of the undertaking (u); and the holder of mortgage debentures secured on the undertaking is not entitled to foreclosure or sale (x).

Undertaking, rates, tolls, &c

When, under the powers of their Act, a railway company mortgages "the undertaking, and the rates, tolls, and all other sums arising by virtue of the Act," no interest in the land passes on which an ejectment can be maintained (y).

And in a similar case of a mortgage by a canal company of their "undertaking, rates, and duties," until the principal sum should be paid by them with interest, Tindal, C J, held that the terms of the contract were satisfied by giving the lenders a security on the undertaking, without allowing them to sue the corporation (z).

The expression "tolls and other sums of money" means sums *ejusdem generis* as tolls (a).

(u) 8 & 9 Vict. c 20

(o) *Legg v Mathieson*, 2 Griff 71
See *Wickham v New Brunswick Rail Co*, L R 1 P C 64

(p) *Doe d Myatt v St Helen's Rail Co*, 2 Q B 364

(q) *Gardner v London, Chatham and Dover Rail Co*, L R 2 Ch A 201.

(r) *Hart v East Union Rail Co*, 8 Exch 116

(s) *Gardner v London, Chatham and Dover Rail Co*, *sup*. And see 8 & 9 Vict c 16, Sched, Form (C)

(t) *De Winton v Mayor of Brecon*, 26 Beav 533

(u) *Gardner v London, Chatham and Dover Rail Co*, L R. 2 Ch A. 201

(x) *Furness v Caterham Rail Co*, 25 Beav 614, S C, 27 Beav 358, *Re Herne Bay Waterworks Co*, 10 Ch D 42, *Blaker v Hents and Essex Waterworks Co*, 40 Ch D 399

(y) *Doe v St Helen's Rail Co*, 2 Q B 364. See *Wickham v New Brunswick, &c Rail Co*, L R 1 P C 64, 78, *Re Bagnallstown Rail Co*, *Exp Smith*, Ir R 1 Eq 275, *Fairtitle v Gilbert*, 2 T R 169. See *Doe v Booth*, 2 B & P 219, and *Perkins v Deptford Pier Co*, 13 Sim 277

(z) *Pontet v Basingstoke Canal Co*, 3 Bing N C 433

(a) *Gardner v London, Chatham and Dover Rail Co*, L R. 2 Ch A. 201.

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Mortgages by
companies of
tolls, &c

Companies incorporated by special Acts, for purposes of a public nature, are often empowered by their Acts to levy tolls on persons using their docks, canals, piers, bridges, or other undertaking, and to raise money for the purposes of their undertakings by mortgage of the tolls. The nature and form of such securities depends upon the provisions of the particular Act.

The following points, decided under the Turnpike Acts (*b*), may be here noticed, as the rules therein laid down appear to be applicable to the class of securities now under consideration.

Ejectment by
mortgagee

A mortgagee of tolls, toll-houses, and gates, can maintain ejectment (*c*), but a mortgagee of the rates and tolls only cannot (*d*).

Mortgagee in
possession

If any mortgagee of the tolls takes possession, he receives the tolls, subject to an account with the other mortgagees for such portion of the tolls as they are entitled to in respect of their advances (*e*).

A mortgagee of tolls has no equity to prevent mortgagees of the land, out of which the tolls issue, entering into the land under their mortgage and judgment (*f*).

Any one of several mortgagees of tolls, toll-houses, &c, may maintain ejectment notwithstanding a clause in the Act that all mortgagees shall be creditors in equal degree (*g*).

Parties to
action

One of several mortgagees cannot bring an action to recover his arrears of interest without making the other mortgagees parties (*h*).

Ultra vires
mortgage of
toll-houses,
&c

A power to mortgage tolls does not authorize a mortgage of toll-houses and land, and, if a mortgage is given including such property, and ejectment is brought by the mortgagee, the mortgagors are not estopped by the deed from insisting that the mortgage was *ultra vires* (*i*).

Estoppel

In a case of a mortgage of tolls under a Bridge Act, which empowered the commissioners to mortgage the bridge and tolls

(*b*) 3 Geo IV c 126, 4 Geo IV c 95, 7 & 8 Geo IV c 24, 9 Geo IV c 77, 3 & 4 Will IV c 80, 4 & 5 Vict c 59, 12 & 13 Vict cc 46, 87. Turnpike trusts have now been abolished, and no further reference to these Acts appears to be here required.

(*c*) *Doe v Lediard*, 4 B & Ad. 137.

(*d*) *Doe v The St Helens and Runcorn Gap Rail Co*, 2 Q B 364. See *Doe v. Horne*, 3 Q B 757, and *Perkins*

v Deptford Pier Co, 13 Sim 277. But see *Doe v Rous*, 17 Jur 502, Q B, *Cobbett v Wheeler*, 9 W R 140, Q B.

(*e*) *Doe v Lediard*, *sup*.

(*f*) *Perkins v Prichard*, 7 Jur 29.

(*g*) *Doe d Banks v Booth*, 2 B & P 219. See *Doe v Penfold*, 3 Q B 757, as to priority, *Jortin v South Eastern Rail Co*, 6 H L O 425.

(*h*) *Mellish v Brookes*, 3 Beav 22.

(*i*) *Fawcett v Gilbert*, 2 T R 169.

as a security for any sum to be borrowed, and provided that the several mortgagees should be severally entitled to the tolls in proportion to the amount of the interest of the sums borrowed; upon an action of ejectment brought by a second mortgagee against the commissioners, they set up a prior mortgage of the same premises, which, it seems, would have defeated the plaintiff's claim, if the Court had not held the commissioners to be estopped from setting up the earlier mortgage, distinguishing the case before them from that of *Fairtitle v Gilbert* (k) on the question of estoppel, in that in the latter the contents of the Act were presumed to be known to both the contracting parties, and to qualify any contract into which they might enter in execution of its powers, whilst in the case before them, no such presumption could be made of the knowledge of the fact that a prior mortgage had been executed (l).

A mortgagee of the rates and tolls of a company will not be allowed an injunction to prevent a subsequent judgment creditor taking possession of the lands, though the consequence might be to prevent the mortgagee from taking the tolls (m).

A mortgage of the rolling stock of a railway has been held valid (n); but it is a question whether the Court would not, upon the intervention of shareholders, or of the Crown, prevent the railway from being deprived of the means of working the line (o).

Mortgage of rolling stock

ii.—Undertaking and Property of Joint Stock Company—Floating Security.—Generally speaking a mortgage or a debenture charging the “undertaking” of a joint stock company includes all the property of the company in existence at the date of the creation of the charge (p); but subsequently acquired property may be expressly included in the charge by the addition of such words as all “property present and future” (q), or “all moneys arising” from “the undertaking” (r); and the intention to include such property may be inferred from the nature of the business of the company, and from the terms of

Mortgage of undertaking or property of a joint stock company

(k) 2 T R 169

(l) *Doe v Horne*, 3 Q B 757

(m) *Perkins v Deptford Pier Co*, 13 Sim 277

(n) *Blackmore v Yates*, L R 2 Ex 225

(o) *Ibid*, at p 227 See *Blaker v Herts and Essex Waterworks Co*, 40 Ch D 399

(p) *Re New Clyde, &c. Iron Co*,

L R 6 Eq 514 See *Re Colonial Trusts Corporation, Ex p Bradshaw*, 15 Ch D 465 (charge on real and personal estate of the company)

(q) *Re Horne and Holland*, 29 Ch D 736, *Edwards v Standard Rolling Stock Syndicate*, (1893) 1 Ch 574

(r) *Re Panama, &c Royal Mail, &c. Co*, L R 5 Ch A 318

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Floating security

articles creating the power to borrow (s) Future book debts may be charged and have been held to be included in a mortgage of the "property" of a company (t)

The effect of a mortgage or debenture charging the "undertaking and property" (u) or the "estate property and effects" (r) of a company, will apparently, as a general rule, be construed as indicating an intention to create a floating security on all property of the company as a going concern, so as to leave the company free to dispose of its property, by sale or otherwise, in the ordinary course of its business under the management of its directors (y) So a company, which had issued mortgage debentures charged on its present and future property by way of floating security, was held to be entitled to apply moneys received from a fire insurance company, while the company was still a going concern, in payment of simple contract debts incurred in the course of its business, and that the payment could not be disturbed by the debenture holders on the ground of fraudulent preference (z)

The holder of a charge comprising by way of floating security the general assets of a company, so long as the company is a going concern, cannot by notice to a debtor to the company, require the particular debt to be paid to him in satisfaction of his charge (a)

When a floating security becomes specific.

But a floating security, though merely general in its inception, will become specific upon the appointment of a receiver (b); or upon the winding up of the company (c), upon the happening of either of which events, the charge created by the debentures or trust deed will attach to all the property belonging to the company at that time, so as to give the debenture holders a

(s) *Re Florence Land, &c Co*, 10 Ch D 530, C A

(t) *Bloomer v Union Coal and Iron Co*, L R 16 Eq 383

(u) *Re Marine Mansions Co*, L R 4 Eq 601 See *Re Panama, &c Royal Mail Co*, L R 5 Ch. A 318

(x) *Re Florence Land, &c Co*, *sup*, *Hodson Tea Co*, 14 Ch D 859

(y) *Re Florence Land, &c Co*, 10 Ch D 530, C A, *Moor v Anglo-Italian Bank*, 10 Ch D 681, *Re Hamilton's Windsor Ironworks Co, Exp Putman*, 12 Ch D 707, *Governments Stock, &c Investment Co v Manila Rail Co*, (1897) A C 81

(z) *Willmott v London Celluloid Co*, 34 Ch D 147, C A See also *English and Scottish Mercantile Investment Trust*,

(1892) 2 Q B 700, C A See further as to fraudulent preference as regards debentures, *post*, p 598

(a) *Robson v Smith*, (1895) 2 Ch 118

(b) *Ames v Buxenhead Docks*, 20 Beav 332, *Bruntion v Electrical Engineering Co*, (1892) 1 Ch 434 See also *Biggerstaffe v Rowatt's Wharf, Limited*, (1896) 2 Ch 93 C A

(c) *Re Marine Insurance Co*, L R 4 Eq 601, *Re Panama, &c Royal Mail Co*, L R 5 Ch A 318, *Hodson v Tea Co*, 14 Ch D 859, *Re Colonial Trust Corp*, 15 Ch D 465 The commencement of the winding up of a company by the Court dates from the appointment of the official liquidator, see *Ibid*

specific charge on that property in priority to all subsequent incumbrancers, creditors, or purchasers (*d*)

But a floating security, created by debentures, will not be rendered specific by mere default on the part of the company in payment of principal or interest or other default under the debentures, or the covering trust deed, in the absence of express stipulation, until the debenture holders take some steps to enforce their security, and to prevent the company from continuing to carry on its business (*e*)

A person who purchased land from a company which had issued debentures expressed to operate as a floating security until default in payment of principal and interest, was held to be entitled to reasonable evidence that there had been no default in payment of principal or interest of the debentures (*f*).

Where debentures by way of floating security fix a time for payment of the principal moneys secured, the winding up of the company before that time renders the money immediately payable, and entitles the debenture holders at once to realize their security for the full amount of principal, interest, and costs (*g*)

Effect of winding up

Inasmuch as debentures which are given by way of floating security do not become specific until the appointment of a receiver, or on the company being wound up, but in the meantime so long as the company is a going concern it may, notwithstanding the debentures, deal with its property in the ordinary course of its business (*h*). Accordingly, a company may, after issuing such debentures, give a mortgage of a specific asset to secure an advance necessary for carrying on its business, which will rank in priority over the debentures (*i*), even though the debentures are expressed to be a first charge on the undertaking and present and future property of the company (*j*)

Company may deal with its property after issuing debentures by way of floating security.

The lien of a solicitor of a company on the title deeds in his possession will prevail over a floating security created by debentures (*k*)

Solicitor's lien

So also a distress levied before a floating security has become specific will prevail over the holders of the debentures (*l*).

(*d*) See as to priorities of securities of companies, *post*, pp 1295 *et seq*

(*e*) *Government Stock Investment, &c Co v Manila Rail Co*, (1897) A C 81

(*f*) *Re Horne and Hellar* *id*, 29 Ch D 736

(*g*) *Wallace v Universal Automatic Co*, (1894) 2 Ch 547, C A

(*h*) *Supra*, p 494

(*i*) *Moor v Anglo-Italian Bank*, 10 Ch D 681, C A, *Re Hamilton's Windsor Ironworks Co*, *Ex p Pitman*, 12 Ch D 707, *Ward v. Royal Ex-*

change Shipping Co, 58 L T 174

(*j*) *Wheatley v Silkstone Coal Co*, 29 Ch D 715 As to constructive notice that such debentures are thereby expressed to be a first charge, see *English and Scottish Mercantile Investment Trust v Brunton*, (1892) 2 Q B 700, C A

(*k*) *Brunton v Electrical Engineering Corp*, (1892) 1 Ch 434

(*l*) *Re Roundwood Coll Co*, *Lee v Roundwood Coll Co*, (1897) 1 Ch 373, C A

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Debentures, which are originally, or which have become charges upon the specific property of the company, are prior to all subsequent incumbrances, judgments, and general creditors, so far as relates to the property specifically charged by the debentures (*m*). And if the property is sold by order of the Court, or by the sheriff, unless the proceeds of sale have been actually received by him, the debenture holders will have priority against the proceeds of sale (*n*), although the debts were incurred in carrying on the business (*o*).

Charge of
land of com-
pany

Where debentures are charged on the property of a company including land, though by way of floating security, a contract for sale of such debentures is a contract for an interest in land within sect 4 of the Statute of Frauds (*p*).

Charge of
chattels

A debenture which comprised the chattels of the company must have been registered under the former Bills of Sale Acts, as against execution creditors; but registration was not necessary against a liquidator under a winding up (*q*), nor is it under the Bills of Sale Act of 1882 (*r*).

A trust deed charging the assets of a company to cover debentures, if duly registered under the Companies Act, 1862 (*s*), is not a bill of sale within sect 14 of the Bills of Sale Act, 1882 (*t*).

After-
acquired stock
in trade

It was held in an Irish case that a mortgage of the present and future stock in trade, plant, property and effects of a company, will create a valid charge as against the general creditors on all after-acquired stock in trade and property (*u*); but this question may perhaps be regarded as still open to doubt (*v*).

Custody of
books, &c

A mortgage of the whole of the property of a company does not give the right of custody of the company's books and documents to the receiver of the debenture holders as against the liquidator, except as regards such documents as are necessary to support the debenture holders' title (*x*).

(*m*) *Ames v Bulthead Docks Trustees*, 20 Beav 332, *Furness v Caterham, &c Co*, 27 Beav 358, *Re Marine Mansions, &c Co*, L R 4 Eq 601, *Re Standard Manufacturing Co*, (1891) 1 Ch 627, *Re Opera Limited*, (1891) 3 Ch 260, C A

(*n*) *Re Panama, &c Royal Mail Co*, L R 5 Ch App 318, *Taunton v Sheriff of Warwickshire*, (1895) 2 Ch 319, C A See *Morrison v Sherne Iron-works Co*, 6 L T 588

(*o*) *Grissell's Case*, 3 Ch D 411, C A

(*p*) 29 Car II c 3 See *Driver v*

Broad, (1893) 1 Q B 744, C A

(*q*) *Re Marine Mansions Co*, L R 4 Eq 601

(*r*) See *ante*, p 209

(*s*) See *infra*, p 500

(*t*) *Richards v Kildermunster (Overseers of)*, (1896) 2 Ch 212

(*u*) *Exp Cox, Re Dublin Drapery Co*, 13 L R Ir 174

(*v*) See *Florence Land, &c Co*, 10 Ch D 630, C A As to future calls, see *post*, p 498

(*x*) *Engel v South Metropolitan Brewing, &c Co (No 2)*, (1892) 1 Ch 442

iii.—Future Calls.—Mortgages of future calls are expressly provided for in the statutory form of mortgage appended to the Companies Clauses Consolidation Act, 1845 (y), for the use of companies constituted under special Acts

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Mortgage of
future calls

The remedy of foreclosure is applicable to the uncalled capital of a joint stock company (s). Foreclosure

A mortgage or debenture given by a joint stock company cannot effectually charge the proceeds of a future call, unless the memorandum gives power to charge them either expressly or by implication from the terms of the power (a). But there is nothing in the Companies Act, 1862 (b), or in any of the amending Acts, which prohibits a company from mortgaging its future or unpaid capital; and accordingly, if the memorandum expressly or impliedly gives power to mortgage such capital, and if the articles of association impose no restrictions on the exercise of such power, a mortgage of such capital is valid so as to give priority over creditors in a winding up (c). Thus, where the memorandum of association of a company specified one of the objects of the company as being "to receive money, or loans, on deposit or otherwise, and upon any security of the company, or upon the security of any property of the company," it was held that these words authorized a charge on uncalled capital (d). But a power to mortgage the "property of the company," without more words, will not authorize a mortgage of unpaid capital, a resolution of the directors making a call being a condition precedent to the proprietary right of the company in such capital (e). So future calls will not be included in a mortgage or debenture by the words "estates," or "all real and personal estate" of the company (f), and a power to mortgage "property and funds" does not authorize a mortgage of uncalled capital (g). A power to mortgage the "assets" of the company will comprise everything which is available to

Memorandum
must give
power to
charge future
calls

(y) And see *Wickham v New Brunswick Rail Co*, L R 1 P C 64

(z) *Sadler v Worley*, (1894) 2 Ch 170 And see post, p 1001

(a) *Stanley's Case*, 4 De G J & S 407, 10 Jur N S 713, *King v Marshall*, 33 Beav 565, *Bank of South Australia v Abrahams*, L R 6 P C 265 And see per Cotton, L J, in *Re Pyle Works*, 44 Ch D 534, at p 574

(b) 25 & 26 Vict c 89

(c) *Re Pyle Works*, 44 Ch D 534, C A See *Re Phoenix Bessemer Steel Co*, 32 L T 854, *Howard v Patent*

Ivory Manufacturing Co, 38 Ch D 156, *Re Pyle Works* (No 2), (1891) 1 Ch 173

(d) *Newton v Anglo-Australian Investment Co*, (1895) A C 244, J C

(e) *Bank of South Australia v Abrahams*, L R 6 P C 265 See *Hulme v Drachenfels, & Co Mining Syndicate*, 2 Manson, 146

(f) *King v Marshall*, 33 Beav 565 See *Re Marine Mansions Co*, L R 4 Eq 601

(g) *Re Colonial Trusts Corp, Ex p Bradshaw*, 15 Ch D 465, C A

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satisfy the liabilities of the company, and, therefore, uncalled capital (*h*) And such a mortgage of future calls has been held to be authorized by a power to charge the "property and rights" of the company (*i*)

In a recent case (*k*), where the memorandum of association contained no reference to borrowing, but the articles authorized the company to borrow upon mortgage of its lands, works, "and other property and effects" for the time being of the company, it was held that the company had power to mortgage its uncalled capital

Effect of
charge of
after-acquired
property or
future calls

The result of the decisions seems to be that a charge of after-acquired property or of unpaid calls, if duly authorized and made by apt terms, will be valid as against the company as a going concern. It has been doubted, having regard to the provisions of the Judicature Act, 1875, s 10, whether a charge of after-acquired property would be supported as against creditors on the winding up of the company (*l*); but the validity of a charge of future calls has been upheld even as against creditors in winding up (*m*) Unpaid calls are not, strictly speaking, the "property," either present or future, of a company, but they are part of the actual capital and assets of a limited company It would seem that this rule would not apply to an unlimited or guarantee company, so as to render the liability of its members part of its capital (*n*)

Arrears of
calls

In the absence of an express power to mortgage calls, arrears of calls may be mortgaged (*o*), and calls already made, though not yet payable (*p*). If a company mortgage a call, and, before it is received, make another call, it cannot prejudice the mortgagees by getting in the second call at the expense of the first (*q*).

The power of directors to make calls *ipso facto* comes to an end on the winding up of the company (*r*). Debentures charging the undertaking and property, present and future, of the company, including uncalled capital, will include all capital got in before liquidation, but not calls got in during liquidation (*s*).

(*h*) *Page v International Agency, & Co Trust*, W N (1893) 32

(*i*) *Howard v Patent Ivory Co*, 38 Ch D 156

(*k*) *Jackson v Rainford Colliery Co*, (1896) 2 Ch 340

(*l*) *Re Florence Land, & Co*, 10 Ch D 530, O A

(*m*) *Re Fyle Works*, 44 Ch D. 534, C A

(*n*) *Per Cotton*, L J, *ibid* at p 574

(*o*) *Re Sankey Brook Coal Co*, L R.

9 Eq 721, 10 Eq 381, *Gibbs' Case*, L R 10 Eq 312

(*p*) *Pickering v Ilfracombe Rail Co*, L R 3 C P 235

(*q*) *Humber Ironworks Co*, 16 W R 474, 667

(*r*) *Fowler v Broad's Patent Night Light Co*, (1893) 1 Ch 724, *Re Streatham and General Estates Co*, (1897) 1 Ch. 15

(*s*) *Re Streatham and General Estates Co*, (1897) 1 Ch 15

SECTION IV

REGISTRATION OF SECURITIES OF COMPANIES.

i.—**Securities of Railway and other Public Companies.**—By sect 45 of the Companies Clauses Consolidation Act, 1845 ^(s) (which, as has been seen, applies to railway companies and other companies constituted under special Acts), a register of mortgages and bonds is required to be kept by the secretary with the particulars therein specified, and to be open to inspection by all persons interested. Register to be kept

By sect. 41 of this Act, mortgages and bonds are to be by deed, under the common seal of the company, duly stamped, and wherein the consideration shall be duly stated, and may be in the forms in the schedule to the Act or to the like effect Statutory form of mortgage

The statement of the consideration will be sufficient if it is apparent on the face of the deed, though not expressly stated in terms ^(t) Consideration

By the Railway Companies Securities Act, 1866 ^(u), provisions are made for making accounts of the loan capital of companies, and for the registration and inspection thereof, and for depositing statements before issuing any debenture stock, and for the declaration to be indorsed on mortgages and bonds, and for specifying in their accounts the particulars of their loan capital, and any new borrowing powers conferred on them Accounts of loan capital, &c of railway companies

ii.—**Securities under Mortgage Debenture Acts.**—A company about to issue mortgage debentures under the Mortgage Debenture Acts ^(x) must produce and deposit for registration the securities upon which such debentures are to be founded at the Office of the Land Registry in a register established for that purpose ^(y), and the aggregate principal sum secured by all such mortgage debentures must never at any time exceed the total amount of the securities of the company so registered, nor ten times the amount for the time being uncalled of its subscribed share capital ^(z) New mortgage debentures may

^(s) 8 & 9 Vict c 16

^(t) *Landowners, &c Co v Ashford*,
16 Ch D 412

^(u) 29 & 30 Vict c 108

^(x) 28 & 29 Vict c 78, 33 & 34
Vict c 20 See ante, p 477

^(y) 28 & 29 Vict c 78, ss 6, 7, 9.

^(z) *Ibid* s 11

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be issued by a company in lieu of those from time to time paid off, provided that neither of the limits above mentioned are at any time exceeded (*d*). Holders of mortgage debentures issued under this Act are to be entitled *pari passu* to the benefit of the registered securities upon which such debentures are founded (*e*). The company is also to keep a register of securities (*f*). Registered securities are charged with the payment of the debentures and interest thereon, and are not applicable for any other purpose until discharged from registration (*g*). All mortgage debentures issued by a company under these Acts are to be registered at the Office of the Land Registry, and indorsed with a memorandum of such registration, without which indorsement no mortgage debenture is to be a charge under the Acts on the registered securities of the company (*h*).

Deposit of
securities with
registrar

The Court has no power to order securities deposited with the registrar to be delivered up to a receiver appointed in a debenture-holder's action, or to a liquidator in the winding up of the company (*i*).

Register of
mortgages,
&c to be
kept

iii.—Securities of Joint Stock Companies.—By sect. 43 of the Companies Act, 1862 (*j*), every limited company under the Act must keep a register of all mortgages and charges specifically affecting the property of the company, with such particulars as in the Act specified, under a penalty not exceeding 50*l*, upon every director, manager, and other officer of the company party or privy to the omission to register, and such register is to be open to inspection by any creditor or member of the company. This right of inspection includes a right to take copies of the register (*k*), but is determined by an order to wind up the company (*l*).

This section applies only to mortgages and charges effected by the company itself, not to pre-existing incumbrances subject to which the company acquired the property (*l*).

Omission to
register.

This section is merely directory, and the validity of a mortgage is not affected by the omission to register it (*m*); if an

(*d*) 28 & 29 Vict c 78, s 13
 (*e*) *Ibid.* s 15
 (*f*) *Ibid* s 27
 (*g*) 33 & 34 Vict c 20, s 7
 (*h*) 28 & 29 Vict c 78, ss 32, 33
 (*i*) *Somerset v Land Securities Co*,
 (1894) 3 Ch 464, C A
 (*j*) 25 & 26 Vict c 89
 (*k*) *Nelson v Anglo-American Land*

Mortgage Co, (1897) 1 Ch 130
 (*kk*) *Somerset v Land Securities Co*,
 W N (1897) 29
 (*l*) *Re General Horticultural Co*, 53
 L T 699 See *Re Underbank Spinning*,
&c Co, 31 Ch D. 226
 (*m*) *Exp Valpy and Chaplin*, L R
 7 Ch A 289, *Wright v Horton*, 12
 App Cas 371

unregistered mortgage has been realized, the amount cannot be directed to be refunded (*n*).

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In numerous earlier cases it was laid down that an officer of the company who took a mortgage from the company, and omitted to register it, could not avail himself of his security, and questions frequently arose as to who were to be deemed officers of the company for this purpose, and as to how far the supposed rule applied to officers who were not themselves guilty of neglect, or to transferees from officers of the company (*o*).

The general rule so laid down has been finally pronounced to be erroneous, and all questions as to its application have been set at rest by the decision of the House of Lords in *Wright v. Horton* (*p*). In that case debentures were issued to a director of the company, but were not registered. On the winding-up of the company, the validity of the debentures was contested by unsecured creditors, and also by debenture-holders, who did not appear to have inquired as to the charges on the company's property, or as to registration. It was held that the debentures were not invalidated as against the director by the omission to register.

Mortgagees do not lose their priority by the omission of the officers to register, and it does not make any difference in this respect whether the mortgagee is or is not an officer of the company (*q*).

Transfers of mortgages and debentures are to be registered in the manner prescribed by the Act (*r*). The transferee must sue on the debentures in his own name (*s*).

Registration
of transfers

(*n*) *Re Borough of Hackney Newspaper Co*, 3 Ch D 669

(*o*) See these cases collected in Coote on Mortgages, 5th ed pp 401, 402, and Buckley, Companies Acts, pp 161 *et seq*

(*p*) 12 App Cas 371

(*q*) *Re General South American Co*, 2 Ch D 337, C A

(*r*) 25 & 26 Vict c 89, s 47

(*s*) *Vertue v East Anglian Rail Co*, 5 Exch 280

CHAPTER XXVIII

OF MORTGAGES BY PARTNERS.

General rule
as to authority
of partner to
bind firm

i.—Of the Power of a Partner to bind the Firm by borrowing and giving Securities for Loans—The existence of a partnership implies such a relation between the partners as that each of them is a principal, and each of them an agent for the other (*a*). And, accordingly, as a general rule, every partner who does any act necessary for, or usually done in, carrying on business of the kind carried on by the firm of which he is a member, thereby binds his partners to the same extent as if he were their agent duly appointed for that purpose, unless the partner so acting has, in fact, no authority to act for the firm in some particular manner, and the person with whom he is dealing knows that he has no such authority (*b*).

Power to
borrow
money

The power of a partner to borrow money on behalf of the firm rests on this principle of partnership agency, by which every member of a firm has, as regards third parties, an implied authority to do all such acts as are necessary for carrying on the business of the firm in the ordinary manner, so as to relieve the person dealing with him from the duty of making further inquiries (*c*). This power is not, however, incidental to every business; whether and to what extent it exists depends upon the nature of the particular business. It may, however, be laid down as a general rule that one partner has an implied power to borrow on behalf of the firm to pay existing debts of the firm incurred in the business (*d*).

(*a*) *Per O'Brien, J.*, in *Shaw v Galt*, 16 Ir Com L R 357. See *Cox v Hickman*, 8 H L C at p 312, *Fole v Leask*, 9 Jur N S 829, *Holme v Hammond*, L R 7 Ex 218, 230, *Pooley v Driver*, 5 Ch. D. 458.

(*b*) *Barr's Case*, L. R. 5 Ch. A. at p. 733. See *Bullen v. Sharp*, L. R.

1 C P 86, *Mollwo v. Court of Wards*, L. R. 4 P C 419.

(*c*) *Okell v Eaton*, 31 L T N S 330. See *Harrison v Jackson*, 7 T R 210, *Rothwell v Humphries*, 1 Esp. 406, *Thicknesse v Bromilow*, 2 Cr J 425.

(*d*) *Brown v. Kidger*, 3 H & N 853

But one partner has no authority to bind his co-partners by borrowing money otherwise than in the ordinary course of business for business purposes (e). So, where the business of a firm is such as, according to the custom of the particular trade, to be usually conducted on ready-money principles, the firm will not be liable to repay moneys borrowed by one of the partners, unless it can be shown that he had express authority to bind the firm by borrowing money (f). If the lender has knowledge or notice that a partner borrowing money has no authority to do so, the firm will not be bound (g).

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Partner cannot bind firm limited by scope of business

Where a partner borrows money on his separate credit, the other members of the firm will not be bound to repay the loan merely because it is proved, as a fact, that the money was applied for the purposes of the partnership (h).

Partner borrowing on separate credit

Where a partner has express or implied authority to borrow money on behalf of the firm, it follows that he has power to give security on the property of the firm for advances. Accordingly, as will be seen hereafter, a partner has a power to pledge partnership chattels as security for a loan (i). And it would seem that a partner may create a valid equitable charge by deposit of deeds relating to real estate of the partnership (k).

Power of partner to give security on partnership property by pledge or equitable charge.

It is, however, a well-settled rule that one partner cannot bind the firm by deed unless expressly authorized so to do (l). In one case, indeed, a bill of sale executed by one partner on behalf of himself and another was held to be binding on both: but in that case it was shown that the partner who executed the deed did so in the name and in the presence of his co-partner, and it was held that the other partner must have treated the deed as his own, though he did not actually seal and deliver it (m). So, it was held that a warrant of attorney under seal, executed by one partner alone with the verbal consent of the other, bound the firm (n).

Partner cannot bind firm by deed.

It may be observed that, if a partner executes a deed on behalf of himself and his co-partners, the deed will bind him,

Deed, when binding on executing partners

(e) *Plumer v Gregory*, L R 18 Eq 621. See *Dickinson v Walpy*, 10 B & Cr 128, *Ricketts v Bennett*, 4 C B 686, *Brettel v Williams*, 4 Exch 630.

(f) *Hawthorne v Bourne*, 7 M & W 595.

(g) *Fisher v Taylor*, 2 Ha 218, *Re Worcester Corn Exchange Co*, 3 De G. M. & G 180.

(h) *Emily v Lye*, 15 East, 7, *Lloyd v Freshfield*, 2 C. & P 325.

(i) *Post*, Chap LXIII.

(k) *Lindley on Partnership*, 152. See *Re Clough*, 31 Ch D 324.

(l) *Harrison v Jackson*, 7 T R 207, *Steghitz v Eggington*, Holt, 141.

(m) *Ball v Dunsterville*, 4 T R 313. See *Burn v Burn*, 3 Ves 578.

(n) *Brutton v Burton*, 1 Chit G P 707.

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though it will not bind the firm (*o*). But if he executes the deed, not on behalf of his co-partners, but merely as one of the members of the firm, and with the expectation that his co-partners will execute it, he will not be bound unless the others execute (*p*).

Legal mortgage must be by all partners.

It follows, from the general rule that express authority is necessary to enable a partner to bind the firm by deed, that a legal mortgage of property of the partnership cannot, in the absence of such authority, be made without the concurrence of all the partners (*q*). Any such authority must itself be under seal (*r*), and the fact that the partnership articles are under seal does not, of itself, confer such authority (*s*).

Advances made after change in firm.

ii.—Effect of Change in Firm on Securities on Partnership Property.—A mortgage or charge upon partnership property given to secure a present loan and present advances will not, as a general rule, cover advances made after a change in the firm by which the security is given (*t*).

Extension of charge by agreement.

But the original security may be made available to cover such advances by subsequent agreement between the lender and the members of the firm as newly constituted. So, an equitable mortgage by deposit of deeds may be extended by parol agreement so as to cover further advances after a change in the firm (*u*).

Extension of legal mortgage.

A legal mortgage cannot, of course, be extended so as to operate as such for securing further advances after a change in the firm, unless the agreement to that effect is made under seal (*x*). But it may be extended by writing not under seal so as to be available as an equitable security for such advances (*y*).

Deposit to secure private debt of partner

Where a partner deposited with the bankers of the firm, who were also his private bankers, certificates of railway shares belonging to the firm as security for his own debt, it was held that the deposit did not cover advances made by the bank to the firm (*z*).

(*o*) *Elliot v Davis*, 2 B & P 338, *Hawkshaw v Parkins*, 2 Swanst 543, *Cumberlege v. Lawson*, 1 C B N. S. 709, *Litch v Wedlake*, 11 A. & E. 959

(*p*) See *Antram v Chace*, 15 East, 209

(*q*) *Lindley on Partnership*, 152.

(*r*) *Steghitz v Eggington*, Holt, 141.

(*s*) *Harrison v. Jackson*, 7 T. R. 207

(*t*) *Bank of Scotland v. Christie*, 8 Cl

& F 214 See *Exp Kensington*, 2 V. & B 3

(*u*) *Exp Lloyd*, 1 Gl & J 389 See *Exp Lane*, De G 300, *Exp Nettleship*, 2 M D & De G 124

(*x*) See *Exp Hooper*, 2 Rose, 328

(*y*) *Exp Farr*, 4 D & C 426

(*z*) *City Bank Case*, 3 De G F & J 629 See *Exp Freen*, 2 Gl & J 246; *Chuck v. Freen*, 1 Moo & M. 259

iii.—Loans to Partnerships in consideration of sharing Profits

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—Advances to partnerships are sometimes made upon the terms that the lender, instead of receiving a fixed rate of interest on the money advanced, shall be entitled to a share in the profits, or to interest at a rate varying with the amount of the profits. Formerly, such an arrangement exposed the lender to the risk of being held to be a partner in the borrowing firm, and liable, by reason of his sharing in the profits, to bear the losses of the firm.

Liability of lender under former law for partnership losses

In order to amend the law in this respect, the Act, commonly called Bovill's Act (a), was passed in 1865. This Act has been repealed, but is virtually re-enacted by the Partnership Act, 1890 (b), which enacts as follows:—

Sharing profits no longer of itself a test of partnership

Sect. 2 (3) "The receipt by a person of the share of the profits of the business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business, and in particular—

Rules for determining existence of partnership

- (a) The receipt by the person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of the business does not of itself make him a partner in the business, or make him liable as such
- (d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing and signed by all parties thereto "

The rule that the contract must be in writing and signed by the parties was the same under Bovill's Act (c)

Contract in writing

It is to be observed that sect. 2 of the Act merely provides that the fact that a loan made at interest varying with the profits shall not "of itself" render the lender a partner, and does not exempt the lender from liability as such if the effect of the transaction is in other respects such as to render him a dormant partner. So, it has been repeatedly held under Bovill's Act, that, where it appears upon the whole agreement that the person advancing the money really does so as a partner, and not by way of loan, he will not be protected from being liable

How far the statutory protection extends

(a) 28 & 29 Vict c 86
(b) 53 & 54 Vict c 39.

(c) See *Poolley v Drwer*, 5 Ch. D. 458.

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as a partner merely because the agreement contains a declaration that the money is advanced by way of loan under the Act, and that the alleged lender shall not be liable as a partner (d).

Syers v Syers

Where an agreement for a loan was executed in the following terms, "In consideration of the sum of 250*l* this day paid to me, I hereby undertake to execute a deed of co-partnership to you for one-eighth share in the profits of the Oxford Music Hall and Tavern to be drawn up under the Limited Partnership Act, commonly called an 'Act to amend the Law of Partnership,'" it was held that the agreement constituted a partnership at will, with an implied stipulation that, as between the parties themselves, the person taking the one-eighth share of the profits should be indemnified against loss (e).

Badeley v Consolidated Bank

On the other hand, where a person advanced money to a railway contractor, and the parties executed a deed whereby the contractor assigned to the lender all his machinery, plant, &c, as security for the loan, and agreed that the lender should receive a fixed rate of interest on the money advanced, and also a share on the profits, it was held, on the construction of the deed, and of correspondence that passed between the parties, that there was no evidence of a partnership so as to render the lender liable for the debts of the contractor (f).

By the Act of 1890, it is further enacted as follows:—

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency

Sect 3. "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied."

Effect of this enactment

It will be observed that the above section affects only the right of the lender to prove in bankruptcy or under a composition, and does not expressly, or as it would seem impliedly, deprive a secured creditor of the benefit of his security. So where a loan was made to a trader at a rate of interest varying

(d) *Exp. Mills, Re Tew*, L R 8 Ch A 569, *Poolley v Driver*, 3 Ch D 458, *Exp Delhasse, Re Megawand*, 7 Ch. D 511, C A

(e) *Syers v Syers*, 1 App Cas 174
(f) *Badeley v Consolidated Bank*, 38 Ch. D 238, C A. See *Davis v. Davis*, (1894) 1 Ch 393.

with the profits of his business, upon the security of a mortgage of the business premises and of the goodwill of the business, the trader having become bankrupt, it was held that the rights of the mortgagee under his mortgage were in no way affected by sect 5 of Bovill's Act.

A person advancing money in consideration of a share of profits cannot prove in competition with any creditor of the trader or firm to whom the money is advanced, whether their claims arose before the agreement for the loan, or after it has been terminated, and other security has been given for the advances made under it (*g*).

Where a person so advancing money also makes other advances to the same trader or firm at a fixed rate of interest, he may prove for the latter *pari passu* with the other creditors (*h*). But if a person lends money on the terms of sharing profits, and afterwards, in lieu thereof, agrees to take a fixed rate of interest, he comes within sect. 3 of the Act, and cannot prove in competition with the other creditors (*i*).

If an agreement for a loan shows an intention that the rate of interest shall in some manner vary with the profits, but is expressed in such vague and uncertain terms that it is impossible to say in what mode such rate of interest is to be ascertained, the agreement will be void for uncertainty, and the lender will be entitled to prove *pari passu* with the other creditors as for money lent (*k*).

iv.—Mortgage of Share in Partnership.—It is one of the fundamental principles of partnership law that no person may be introduced as a partner without the consent of all existing partners (*l*). A partner cannot, therefore, by assigning his share, impose the assignee on the firm as a partner against the will of the other members (*m*).

Mortgagee of share does not become a partner

But there is nothing to prevent a partner from assigning or charging his share without the consent of his co-partners; and even before the Partnership Act, 1890, it was held that the assignee or incumbrancer of a share was entitled to payment

Nature of mortgage of share.

(*g*) *Exp Taylor, Re Grayson*, 12 Ch D 366. See *Re Hildesheim*, (1893) 2 Q B 357, C A.
(*h*) *Exp Mills, Re Tew*, L R 8 Ch A 569.
(*i*) *Re Stone*, 33 Ch. D. 541.

(*k*) *Re Vince*, (1892) 2 Q B 478.
(*l*) Landley on Partnership, 366. And see Partnership Act, 1890, s 24, sub-s 7.
(*m*) *Jefferys v. Smith*, 3 Russ 158.

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of what, upon the accounts being taken, appear to be due to the partner in respect of his share (*n*); and it would seem that the mortgagee of a share in a partnership could require from the other partners an account of the mortgagor's interest in the partnership (*o*)

The rights of the assignee of the share in a partnership are now regulated by the Acts of 1890 (*p*), which enacts as follows :—

Rights of
assignee
of share in
partnership

Sect. 31 “(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

“(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution ”

It will be observed that by sub-s (1), the right of the assignee to compel the other partners to account is expressly negated

Registration
under Bills of
Sale Acts not
necessary

Upon the principle that the only right of the mortgagee of a share in a partnership is to receive the share of profits of the assignor, it has been held that a mortgage of such a share does not require registration as a bill of sale by reason of its including the mortgagor's share in the goods and chattels of the partnership (*q*)

(*n*) *Bentley v Bates*, 4 Y. & C 182,
Glynn v. Hood, 1 De G. F. & J 334,
Smith v Parks, 16 Beav 115, *Kelly v*
Hulton, L R 3 Ch A 703, *Cavander*
v Bulleel, L R 9 Ch A 79

(*o*) *Whetham v Davey*, 30 Ch D

574 But see *contra*, *Brown v De Tastet*,
Jac 284

(*p*) 53 & 54 Vict c 39

(*q*) *Re Barnbridge, Ex p Fletcher*, 8
Ch D 218

CHAPTER XXIX.

OF MORTGAGES TO TRUSTEES

SECTION I

OF MORTGAGE INVESTMENTS BY TRUSTEES OF SETTLEMENTS
AND WILLS

i.—Of the Power of Trustees to Invest on Mortgage generally — Court did
Formerly, where trustees had no express power under the not formerly
instrument creating the trust to invest on mortgage, the Court sanction
generally restricted them to investments in Consols, and did not mortgage
sanction or countenance an investment of trust moneys on real investments of
security, except under special circumstances (*a*). trust moneys

But, in later times, this rule was to some extent relaxed (*b*) ; Relaxation
and mortgage investments of trust moneys are, under certain of the rule
conditions, now authorized by the statutory enactments to be
presently considered

So, formerly, it was considered that, on a sale by trustees, Leaving part
they were not justified in leaving part of the purchase-money of purchase-
on mortgage of the land sold (*c*) But now that trustees are money on
authorized to invest on good and sufficient real security, there mortgage
cannot be any objection to their so doing

Where trustee-mortgagees sold under a power of sale contained
in their mortgage, and allowed part of the purchase-money to
remain on a mortgage of the same property given by the
purchaser, it was held that the power of sale was duly
exercised (*d*)

Trustees, though expressly empowered by the terms of their When trustees
trust to invest on good and sufficient security at interest, must must obtain
sanction of

(*a*) *Norbury v Norbury*, 4 Madd
191, *Ex parte Franklin*, 1 De G & S
531, *Barry v Marrott*, 2 De G & S
491, *Robinson v Robinson*, 1 De G M
& G 247, *Raby v Ridehalgh*, 7 De G
M & G 104

(*b*) See *Ungless v Tuff*, 9 W R
729

(*c*) *Davey v Durrant*, 1 De G & J
535

(*d*) *Thurlow v Mackeson*, L R 4
Q B 97 See *Cookson v Lee*, 23 L J
Ch 473

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Court to
mortgage
investments
Liability of
trustees for
loss

Discretion
of trustees

Mortgage
investments
of moneys of
infants

Moneys of
lunatics

not lend trust moneys on mortgage after a decree for account without the sanction of the Court (*d*)

Where an action is brought for the administration of a trust estate, if the trustees have invested on mortgage contrary to the trust, or in disobedience of an order to the contrary, the executors or trustees will be responsible for the loss; but otherwise the mortgage will be a fund in their hands, which they will be ordered to pay into Court (*e*).

The Court will not interfere with the discretion of trustees as to the choice of investments, unless it is shown that that discretion is being exercised in an improper manner, or upon unreasonable grounds (*f*).

With respect to infants, they are, of course, incapable of lending money on mortgage; nor has the guardian or trustee, nor even the Court, any power to change the nature of the infant's estate

If an infant has money outstanding, although the Court will not interfere with the discretion of the trustees in investing such moneys on real security or otherwise, provided the investment is in accordance with statutory provision or the terms of the trust, and in other respects proper, yet it will not itself authorize the investment of money of infants in real security, except under special circumstances (*g*). An inquiry, however, may be directed whether it will be for the benefit of an infant that uninvested moneys belonging to him should be laid out in the purchase of any existing charge on his own real estate (*h*); but, in such case, the charge is kept alive for the benefit of his personal estate, in case he should die under twenty-one (*i*). Nor will the Court, under the powers of 4 & 5 Will IV c 29, direct an investment of money, in which an infant is interested, in fresh real securities, without a reference to ascertain that the transaction is for the benefit of the infant (*k*).

The committee of a lunatic will not, in general, be allowed to invest the property of a lunatic on real security, except in very peculiar cases; as where the lunatic has an interest in the estate, or the investment is in some other manner connected with his

(*d*) *Widdowson v Duck*, 2 Mer 494
See *Bethell v Abraham*, L R 17 Eq 24.

(*e*) *Widdowson v Duck*, 2 Mer 294

(*f*) *Lee v Young*, 2 Y & C C C 532

(*g*) *Norbury v Norbury*, 4 Madd 191,
Bale v Hoopen, 5 De G M & G 338

(*h*) *Macpherson on Infants*, 278.

(*i*) *Seys v Price*, 9 Mod 217, 221,
Exp Phillips, 19 Ves 122

(*k*) *Exp French*, 7 Sim 510, *Stuart v Stuart*, 3 Beav 430, *Exp Pawlett*, 1 Ph 570, *Re Kirkpatrick's Trusts*, 15 Jur 941, *Norris v Wright*, 14 Beav 291. This rule is, however, now applied less strictly. See *Ungless v Tuff*, 9 W R 729.

immediate interests. Money belonging to the lunatic has been ordered to be lent on mortgage, for the accommodation of his family, on the condition of its being the first incumbrance on the estate (*l*).

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The same rule is generally applied as regards trust funds subject to the control of the Court (*m*). Money paid in under the Lands Clauses Act (*n*) is cash under the control of the Court (*o*).

Fund in Court

In the exercise of his discretionary power of investment, a trustee is bound not only to employ the same degree of diligence that a man of ordinary prudence would exercise in the management of his own private affairs, but he must also avoid all investments attended with hazard (*p*). The rule is thus laid down by Lindley, L J (*q*): "The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide."

Trustees must exercise due diligence

Any consent to investment required by the instrument creating the trust must be obtained in strict accordance with the terms of the instrument. So if a written consent is required, parol consent will not be sufficient (*r*). If a previous consent is required, a subsequent consent would not protect the trustees (*s*). And generally a subsequent consent is ineffectual (*t*), unless the person whose consent is required shows his acquiescence by some act, as by receiving dividends arising from the new investment, without objection (*u*). The consent must not be prospective, but must be given in respect of a particular investment (*x*).

Consents must be obtained in strict accordance with terms of trust

If consent is required to the calling in of trust funds, the trustee will not be liable if the funds are lost before the consent is given (*y*). But the Court will protect the remainderman by

Dispensing with consent

(*l*) *Exp Calthorpe*, 1 Cox, 182, *Exp Ellis*, Jac 234, *Exp Johnson*, 1 Moll 128. As to transfer of debentures of a lunatic, see *Re Mitchell*, 17 Ch D 515, C A., and see 53 & 54 Vict c 5, s 136.

(*m*) See *Baud v Fardell*, 7 De G M & G 633.

(*n*) 8 & 9 Vict c 18.

(*o*) *Re St John Baptist Coll*, 22 Ch D 93, C A.

(*p*) *Per* Lord Watson, in *Learoyd v Whiteley*, 12 App Cas 727, at p 733. See *Spreight v Gaunt*, 9 App Cas 1, *Knox v Mackinnon* 13 App Cas 753.

Rae v Meek, 14 App Cas 558.

(*q*) *Re Whiteley*, *Whiteley v Learoyd*, 33 Ch D 347, at p 355, affirmed in D P sub nom *Learoyd v Whiteley*, sup.

(*r*) *Cocker v Quayle*, 1 R & M 535, *Norris v Wright*, 14 Beav 291.

(*s*) *Stevens v Robertson*, 37 L J Ch 499.

(*t*) *Bateman v Davis*, 3 Madd 98.

(*u*) *Stevens v Robertson*, sup, *Re Massingberd*, *Clarke v Trelawney*, 63 L T 296.

(*x*) *Child v Child*, 20 Beav 50.

(*y*) *De Manneville v Crompton*, 1 V. & B 354.

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Sale of stock
for re-invest-
ment on
mortgage

No appor-
tionment of
proceeds to
income

Liability for
improper sale
and re-invest-
ment

Replacement
of stock

Repayment
of proceeds
of sale

Retaining
existing
securities

dispensing with consent if the funds are in danger (*z*). So, also, where the person whose consent is required was a lunatic (*a*) Consent will be presumed after a considerable lapse of time (*b*)

Where trustees have an express or statutory power to vary investments, they are justified in selling out stock, or realizing any existing security or other investment of the trust funds, and in investing the proceeds on mortgage; and it would seem clear that if the sale is made *bonâ fide*, the trustees will not be liable if the fine realized is less than that for which the stock or other investment was originally bought (*c*)

The trustees should time the change of investment so that the interest on the mortgage shall begin to run as soon as possible after the receipt of a dividend on the stock sold; otherwise, the tenant for life will not be entitled to apportionment to income of any part of the proceeds of sale (*d*), except under very special circumstances (*e*).

If trustees sell out stock for the purpose of investing the proceeds of sale on improper security, the impropriety of the investment will vitiate the sale, so that the trustees will be liable, at the option of the beneficiary, either to replace the stock, or to repay the proceeds of sale (*f*)

If the stock is replaced, the intermediate dividends must be accounted for and paid (*g*).

If the proceeds of sale are repaid, interest from the time of sale till repayment will be chargeable against the trustees at the rate of five per cent. per annum (*h*)

An executor or trustee is not called upon to realize money outstanding on good mortgage security (*i*). And, if directed to invest a legacy on real security, he may appropriate a subsisting mortgage of the testator (*k*) But in either case he must satisfy himself as to the sufficiency of the security; if it should appear

(*z*) *Costello v O'Rourke*, Ir R 3 Eq 172

(*a*) *Re J—*, 15 Ch D 78

(*b*) *Re Burch*, 17 Beav 358

(*c*) See Lewin on Trusts, 353

(*d*) *Scholefield v Redfern*, 2 Dr & Sm 173, *Freeman v Whitbread*, L R 1 Eq 266

(*e*) *Lord Londesborough v Somerville*, 19 Beav 295

(*f*) *Bostock v Blakeney*, 2 B C C 653, *Exp Shakeshaft*, 3 B C C 197, *Phillipson v Gatty*, 7 Ha 516, *Norris v Wright*, 14 Beav 304, *Phillipo v Munnings*, 2 My & Cr. 309, *Wigles-*

worth v Wiglesworth, 16 Beav 269, *Fowler v Reynal*, 3 Mac & G 500, *Rowland v Withden*, 3 Mac & G 565, *Re Massingberd's Settlement*, 63 L T 296

(*g*) *Davenport v Stafford*, 14 Beav 319, 335

(*h*) *Pocock v Redington*, 5 Ves 794, *Mosley v Ward*, 11 Ves 581, *Oakels v Bethune*, 1 J & W 587, *Jones v Foxall*, 15 Beav 392

(*i*) *Ori v Newton*, 2 Cox, 274 See *Howe v Lord Dartmouth*, 7 Ves 150

(*k*) *Ames v Parkinson*, 7 Beav 359 See *Fraser v. Murdoch*, 6 App Cas 855

to be inadequate, he should require the mortgage to be paid off even though the person whose consent is required to changes of investment refuses such consent (*l*).

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The Court has a discretion to allow even unauthorized investments to be retained if for the benefit of infants, but special circumstances must be shown (*m*).

ii.—Statutory Powers of Trustees to invest on Real Securities —By the Law of Property Amendment Act, 1859 (*n*), trustees, executors, and administrators, unless expressly forbidden by the terms of the trust, were empowered to invest on real securities in any part of the United Kingdom

Statutory powers to invest on mortgage

This enactment was repealed, but virtually re-enacted, by the Trust Investment Act, 1889 (*o*), which applied to trusts created before as well as to trusts created after the passing of the Act. This Act was, in its turn, repealed (except as to sects 1 and 7, which are immaterial to the present purpose) by the Trustee Act, 1893 (*p*).

By sect 1 of the last-mentioned Act, a trustee may, unless forbidden by the instrument creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in (amongst other investments) real or heritable securities in Great Britain or Ireland, and may also from time to time vary such investments. This power applies as well to trusts created before as to trusts created after the passing of this Act (*q*), and is in addition to the powers, if any, contained in the instrument creating the trust (*r*); but the power can only be exercised by the trustees subject to any consent required by the instrument creating the trust (*s*).

Trustee Act, 1893, s 1

By sect 50, the expressions "trust" and "trustee" are thus defined for the purposes of this Act:—

Meaning of "trust" and "trustee"

"The expression 'trust' does not include the duties incident to an estate conveyed by way of mortgage, but, with this exception, the expressions 'trust' and 'trustee' include implied and constructive trusts, and cases where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person."

(*l*) *Harrison v Theatlon*, 4 Jur N S 550. See *Ames v Parkinson*, *sup*

(*m*) *Fox v Dolby*, W N (1883) 29

(*n*) 22 & 23 Vict c 35, s 32. See *Re Simson's Trusts*, 1 J. & H 89

(*o*) 52 & 53 Vict c 32

(*p*) 56 & 57 Vict c 53

(*q*) 22nd September, 1893

(*r*) See sect 4 of the Act

(*s*) See sect 3 of the Act

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Statutory
power to
invest trust
moneys on
real securities

Sect. 1 of the Act of 1893 also empowers trustees to invest in any of the securities for the time being authorized for the investment of cash under the control or subject to the order of the High Court. But, so far as mortgage investments are concerned, the rule of Court at present in force is more restricted than the statutory power, the former authorizing only investments on mortgage of freehold and copyhold estates respectively in England and Wales.

Investments
on heritable
securities in
Scotland

The expression "heritable" seems to authorize trustees of English and Irish trust instruments to invest on the security of heritable property in Scotland, which includes not only what in England would be deemed to be real property, but also leaseholds, unless heirs are expressly excluded by the terms of the lease from taking (*t*). But such investments of trust funds are not generally to be recommended having regard to the consideration that the law as to land and the practice of conveyancing materially differ in the two countries (*u*).

Investment
on mortgage
of land in
Ireland.

The statutory power of investment extends to loans on the security of real securities in Ireland unless forbidden by the trust instrument. But securities of this nature are not authorized by the present rules as regards the investment of cash under control of the Court. The law of Ireland relating to land, although originally the same as that of England, has been modified by various statutory enactments, the effects of which, as regards land tenure, are not generally understood by Englishmen.

Moreover, the enactments referred to have not, so far, achieved any marked success in improving the material, social, or political state of Ireland, so as to render it prudent for English trustees to invest capital there (*x*).

Accordingly the investment of English trust funds on the security of Irish land is not generally to be recommended.

By the statute 4 & 5 Will IV c. 29 (*y*), when trust money was liable to be invested in real securities in Ireland, power was given to trustees to invest in real securities in Ireland unless such investment was expressly forbidden; but, where persons

(*t*) Paterson's Compendium, sect 715

(*u*) See *Re Miles' Will*, 27 Beav 579

(*x*) See the observations of Bacon, V-C, in *Re Maberly, Maberly v Maberly*, 33 Ch D at p 468. And see *Stuart v Stuart*, 3 Beav. 430

(*y*) This statute was virtually super-

seded by the statutory power to invest real securities in any part of the United Kingdom given by the Law of Property Amendment Act, 1859, and is now repealed by the Trust Investment Act, 1889, sect 8, and Schedule

under disability were interested, the sanction of the English Court of Chancery was required to the investment. Orders under this Act were made by Sir L. Shadwell, V.-C. (z), and by Lord Lyndhurst, C. (a); but other judges showed a marked reluctance to allow English trust funds to be invested on the security of Irish land (b). In one case, where an order was made under the Act, the trustees were strictly held responsible for loss occasioned by insufficiency of the value of the mortgaged property (c).

By the Improvement of Land Act, 1864 (d), trustees, &c, Improvement charges directed or empowered to invest on real securities, may lend money on charges created under the Act or mortgages thereof. But the Act, which came into operation on the 29th July, 1864, is apparently not retrospective so as to allow of the investment in such securities of trust moneys settled by instruments made before that date.

iii.—Statutory Powers of Trustees to invest on Debentures, &c. Debentures, &c
of Companies.—Mortgages, debentures, and debenture stock of railway companies, water companies, and other public companies are not, generally speaking, “real securities,” inasmuch as the holder has no right to the soil of the lands acquired by the company (e).

By sect 1 of the Trustee Act, 1893 (re-enacting the repealed Trustee Act, 1893, s. 8 provisions of the Trust Investment Act, 1889 (f)), the following limited power is given to trustees to invest in securities such as are above referred to:—

“A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say —

(g) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament (g), and having during each of the ten years last past before the date of

(z) *Exp French*, 7 Sim 510

(a) *Exp Pawlet*, 1 Ph 570

(b) *Stuart v Stuart*, 3 Beav 430,
Re Kirkpatrick's Trust, 15 Jur 942

(c) *Noirs v Wright*, 14 Beav 291

(d) 27 & 28 Vict c 114, s 60

(e) *Mant v Leith*, 15 Beav 524,
Mortimore v Mortimore, 4 De G & J
472, *Gardner v London, Chatham and
Dover Rail Co*, L R 2 Ch A 201,

Aitree v Hawe, 9 Ch D 837, *Blaker
v Herts & Essex Waterworks*, 41 Ch
D 399, *Re Parker, Wignall v Park*,
(1891) 1 Ch 682, and see *Re Sharp*,
Rickett v Sharp, 45 Ch D 286 (public
company), *Elve v Boyton*, (1891) 1 Ch
501, C A (company incorporated by
Act of Parliament)

(f) 52 & 53 Vict c 32

(g) See *Elve v Boyton*, *supra*.

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investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock

(1) In the debenture stock of any railway company in India, the interest on which is paid or guaranteed by the Secretary of State in Council of India

(1) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock "

Debenture stock.

Where trustees are empowered to invest on mortgages or debentures of railways or other companies, they may invest in debenture stock (*h*)

Investment on debentures, &c., of capital moneys arising under Settled Land Acts.

By sect 21 of the Settled Land Act, 1882 (*i*), capital money arising under the Act may be invested "on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities "

Debentures of local authorities

This enactment does not authorize investment, under the powers of sect 27 of the Local Loans Act, 1875 (*j*), in debentures or debenture stock issued by a local authority under that Act (*k*)

Costs of investment

The costs of investment are payable out of the capital and not by the tenant for life (*l*)

Mortgage Debenture Act, 1865.

The Mortgage Debenture Act, 1865 (*m*), empowers trustees having a power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, to invest such moneys on the security of mortgage debentures issued under and in accordance with the provisions of that Act.

Interests of all the beneficiaries must be considered.

iv.—What kinds of Property form proper Mortgage Investments of Trust Moneys —Trustees, when investing on mortgage security, as when making any other investment, must not only

(*h*) *Re Mackenzie's Trusts*, 23 Ch D 750

(*i*) 45 & 46 Vict c 38

(*j*) 38 & 39 Vict c 83

(*k*) *Re Maberly, Maberly v Maberly*,

38 Ch D 455

(*l*) *Re Mackenzie's Trusts*, 23 Ch D. 750, *Re Hanbury's Trusts*, W N (1883) 116

(*m*) 28 & 29 Vict. c 78, s 40.

invest in strict accordance with the terms of their power, but must hold an even hand between the tenant for life and the remainderman. Applications are frequently made to trustees to change investments, so as to secure a higher rate of interest for the tenant for life; but if they improperly accede to such requests, by investing on a security which, from its speculative character or otherwise, is likely to cause loss to the remainderman, and such loss actually occurs, they will be liable for the consequences, even though the security taken may literally fall within the range of investments permitted by the instrument creating the trust or by statutory enactment (*n*). On the other hand, trustees ought not unduly to favour the remainderman at the expense of the tenant for life. They are bound to preserve the money for those entitled to the *corpus* in remainder, but they are bound to invest it in such a way as will produce a reasonable income for those enjoying the income for the present (*o*).

A power to invest on the security of freehold hereditaments will authorize a loan on a mortgage of freehold ground rents; and in such a case the Court does not look only at the rents, but also at the buildings which are liable for the payment of them (*p*).

Mortgage of
ground rents

Of course a power to invest on real securities does not justify a loan on the security of a life estate in freeholds coupled with a policy of assurance on the life of the borrower (*q*); for the policy which is the main security for the repayment of the principal advanced is merely personal security, depending not only on the regular payment of the premiums, but on the solvency of the society by which the policy is issued.

Life estate
and policy

The question whether turnpike bonds, debenture bonds issued under special Acts of canal companies, harbour boards and the like, are "real securities" has been raised in numerous cases, and particularly with reference to the provisions of the Mortmain Act (*r*), and the Mortmain and Charitable Trusts Act, 1888 (*s*), which prohibited devises for charitable purposes of "lands, tenements, or other hereditaments, corporeal or incorporeal, whatsoever." The result appears to be that in each

Turnpike
bonds, &c

(*n*) *Cookburn v Peel*, 3 De G F & J 170. See *Raby v Ridehalgh*, 7 De G M & G 104, 109, *Stuart v Stuart*, 3 Beav 430.

(*o*) *Per Cotton*, L J, in *Whiteley v Leary*, 347, at p 350.

(*p*) *Vickey v Evans*, 33 Beav 376,

3 N R 286. See *Re Peyton's Settlement Trusts*, L R 7 Eq 463.

(*q*) *Lander v Weston*, 3 Drew 389, *Fitzgerald v Fitzgerald*, 6 Ir Ch R, 145.

(*r*) 9 Geo II c 26.

(*s*) 51 & 52 Vict c 42.

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case the terms of the special Act authorizing the issue of the securities, and the wording of the particular instrument creating the security, must be looked at to see whether anything in the nature of land is included in the bond, or only the tolls, rents, and profits, as distinguished from, and independent of, the land (t)

Renewable
leaseholds
for lives

A power to invest trust moneys on "real securities in Ireland" has been held to authorize a loan on the security of leaseholds for lives perpetually renewable at a head-rent, this being a common tenure of land in Ireland (u). It is to be observed, however, that the power in that case also expressly authorized investment on leasehold securities. Such tenure is now convertible by statutory grant into an estate in fee simple at a fee farm rent (x).

Trade
premises

A power to invest on real securities does not authorize a mortgage on freehold land the value of which depends on fluctuations of trade or business (y). In *Re Whiteley, Whiteley v Learoyd* (z), the question was raised whether an investment of trust money on a mortgage of a freehold brickfield was within such a power. Sir N Lindley, L J., said (a) that such a mortgage would be a real security within the power if the value of the land, apart from the particular trade carried on upon it, was sufficient to secure the sum advanced, but that a security of so hazardous a nature, though in one sense and to some extent a real security, was not a proper security for trust money; it was not, in truth, a real security for any sum beyond the value of the land. And Sir H Cotton, L J., expressed his opinion (b) that the mortgage of the land was undoubtedly a real security, and did not become less so because trade buildings and machinery were upon it, but his Lordship pointed out that, in this case, the security depended for its value on the particular trade carried on there, and on the value of the buildings and machinery which could only be used for that particular business, and which was not reasonably available for other purposes. The Court of

(t) See *Robinson v Robinson*, 1 De G M & G 247, *Holgate v Jennings*, 24 Beav 623, *Cavendish v Cavendish*, 30 Ch D 227, *Re Christmas, Martin v Lacon*, 33 Ch D 332 (where the principal cases are reviewed), *Re David, Buckley v Royal National Lifeboat Institution*, 43 Ch D 27.

(u) *Macleod v. Annisley*, 16 Beav.

600

(x) See 12 & 13 Vict c. 105, and 31 & 32 Vict c. 62.

(y) *Streckney v Sewell*, 1 My & Cr 8. See *Stretton v Ashmall*, 3 Drew 9, *Royds v Royds*, 14 Beav 54.

(z) 33 Ch D 347.

(a) *Ibid.*, at p. 356.

(b) *Ibid.*, at pp. 351, 352.

Appeal held that the trustees were liable to make good the loss to the estate caused by failure of the security, and this decision was affirmed by the House of Lords (e). CHAP XXIX

So, also, caution should be exercised in lending trust money on mortgage of a public-house, especially if recently opened, where the value of the security depends on the renewal of the licence (d). Public-house

Trustees should not, as a general rule, lend on the security of unlet houses, especially if the mortgagor is a builder (e). But in a Scotch case it was said that the mere fact that buildings comprised in a mortgage were unfinished would not be material if due security was taken for their completion (f). Unlet houses.

So, also, cottage property let at weekly rents is not a proper security for trust moneys (g). Cottage property

Copyholds are a real security, and accordingly an investment upon a mortgage of copyholds is within a power to invest on real securities. Copyholds

Before the passing of the Trustee Act, 1888 (h), trustees authorized by statute or by the terms of the trust instrument to invest on real securities, were not justified in making an advance on the security of a long term of years, such securities not answering to the description of "real securities" (i). Long lease-holds

But by sect 9 of that Act, such investments were authorized subject to the limitations therein mentioned. This section is now repealed, but re-enacted in identical terms by sect. 5 of the Trustee Act, 1893 (j), which enacts as follows. — Trustee Act, 1893, s 5

"A trustee having power to invest in real securities, unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest— Enlargement of express powers of investment

(a) On mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption, or to any condition for re-entry, except for non-payment of rent, and

(b) On any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864."

(e) *Sub nom Learoyd v. Whiteley*, 12 App Cas 727

(d) *Budge v. Gummow*, L R 7 Ch A. 719

(e) *Hoey v. Green*, W N (1884) 236
See *Smethurst v. Hastings*, 30 Ch D. 490, *Blyth v. Fladgate*, (1891) 1 Ch. 337.

(f) *Per Lord Herschell in Rae v.*

Meek, 14 App Cas 558, at p 571

(g) *Re Olive, Olive v. Westerman*, 34 Ch D 70, 75 See *Re Salmon, Priest v. Uppleby*, 42 Ch D. 351

(h) 51 & 52 Vict c 59

(i) *Re Boyd's Settled Estates*, 14 Ch D. 626 See *Lough v. Lough*, 56 L J. Ch 125.

(j) 56 & 57 Vict. c. 53.

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Leaseholds
for short
terms

It may be laid down as a general rule that an investment of trust moneys on a mortgage of leaseholds held for a short term and incumbered with onerous covenants and clauses of forfeiture is, in the absence of express direction in the trust instrument, improper (*k*). There is the further objection to investments on such security that the lessee cannot generally procure production of his lessor's title (*l*).

Personal
security

It is a breach of trust to lend trust money on personal security, unless such a mode of investment is clearly authorized by the terms of the trust instrument (*m*). Even an apparently absolute discretion in the trustees will not justify an investment on such security

So a power to place out at interest "as the trustees should see occasion," was held not to authorize a loan on personal security (*n*). A discretionary power of investment can only be exercised subject to the control of the Court, where the trust is being administered by the Court (*o*).

Where trustees of a settlement authorizing only investments in government or real securities, advanced part of the trust funds to a banking firm on a mortgage of bonds in which the bankers were obligees, the trustees were held liable for the loss caused by failure of the security (*p*).

Meaning of
"personal
security"

A power to lend on "personal security" may mean either on the security of personal property, or on the security of the borrower's personal undertaking. Where trustees of a marriage settlement, having a power to invest on "real or personal" security, allowed trust money, which had been advanced prior to the marriage, to remain outstanding on the note of hand of the husband, the Court allowed the investment to be continued until further order, on the husband executing to the trustees a bond for the amount of the loan (*q*).

So where the words of a power in a will were "heritable or personal" security, and it appeared that the testator had been used in his lifetime to lend money without security to one of

(*k*) *Townend v Townend*, 1 Giff 201, 211, *Cadogan v Essex*, 2 Drew 227, *Fuller v Knight*, 6 Beav 209, *Re Chennell, Jones v Chennell*, 8 Ch D 492

(*l*) *Post*, p 533

(*m*) *Holmes v Dyming*, 2 Cox, 1, *Wilkes v Steward*, 6 Coop 6, *Figross v Bunfield*, 3 Madd 62, *Philpott v Gatty*, 7 Ha. 516, *Groom v Booth*,

1 Drew 548, *Styles v Gay*, 1 Man & Gr 423

(*n*) *Pocock v Redington*, 5 Ves 794

(*o*) *Bethell v Abraham*, L R 17 Eq 24

(*p*) *Exp Geaves*, 8 De G M & G 291

(*q*) *Pickard v Anderson*, L R. 13 Eq 608,

the persons whom he appointed a trustee of his will, Lord Thurlow allowed trust money to remain in the hands of the trustee at interest, without requiring a mortgage to be taken ^(r)

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But, as a general rule, it is a breach of trust for trustees who are empowered to lend on personal security to lend to one of themselves on his bond or personal undertaking; such a security depends solely on the solvency of the borrower, with respect to which the settlor must be taken to rely upon the united vigilance of all the trustees ^(s) Nor will such a power authorize a loan of trust moneys to a tenant for life, whose consent is required to investments ^(t)

Loan to co-trustee on personal security

But if the power expressly authorizes a loan to a trustee on personal security, the co-trustee will not be liable for loss of the money advanced, in the absence of proof of misconduct on his part contributing to the loss ^(u)

No reported case seems to go so far as to decide that a loan by trustees to one of themselves, if otherwise proper at the time of taking the security, as regards the nature and value of the mortgaged property, and in all other respects, and in the absence of subsequent misconduct or want of care on the part of the trustees, constitutes such a breach of trust as will of itself render the other trustees liable for loss to the trust fund through failure of the security and insolvency of the debtor But it is obvious that a loan to a co-trustee is objectionable and improper, inasmuch as the beneficiaries are entitled to have the unbiassed judgment of all the trustees as to the expediency of the proposed security; and such a loan places the borrowing trustee in a position in which his interest is liable to conflict with his duty, and tends to put difficulties in the way of the proper exercise by the other trustees of their rights and remedies as mortgagees; moreover, it may happen that, by the death or the retirement of the other trustees, the borrowing trustee may be left in the inconsistent character of mortgagor and sole mortgagee The Court would certainly regard such a loan with the utmost jealousy ^(x).

Loans to co-trustee generally improper

^(r) *Forbes v Ross*, 2 Bro C C 430

^(s) ——— *v Walker*, 5 Russ 7
See *Stuckney v Sewell*, 1 My & Cr 8
(where a mortgage was taken of property of inadequate value), *Francis v Francis*, 5 De G M & G 108 (where trustees advanced money to a co-trustee on mortgages of terms of

years), *Westover v Chapman*, 1 Coll 177

^(t) *Keays v Lane*, Ir R 3 Eq 1

^(u) *Paddon v Richardson*, 7 De G M & G 563

^(x) *Pocock v Reddington*, 5 Ves. at p. 799.

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Accommodation
loan

Loan to firm.

Rule where
trust is ad-
ministered
by CourtMortgages
of undivided
shares and
reversions.Disadvan-
tages of such
securitiesTrustees
should acquire
legal estate
in mortgaged
propertyCopyholds to
be surren-
dered

A power to lend on personal security will not extend to an accommodation loan (*y*).

Where a testator by his will authorizes his trustees to lend a sum of money on personal security, to a particular firm, it is a breach of trust to continue the loan after a change takes place in the members of the firm (*z*).

Where a trust instrument authorizes investments on personal security, and the trust is being administered by the Court, it would seem that, though existing investments on such security may be allowed to remain, future investments will be confined to such stocks, funds, and securities as are authorized for investment of cash under the control of the Court (*a*).

There seems to be no rule against lending trust money on the security of an undivided share or of a reversionary interest, but in the latter case, care should be taken to ascertain the present value of the reversion, and not to lend more than the proper proportion of such value.

It is obvious that a power of sale is essential as a means of rendering such securities available. Lending on the security of an undivided share is open to the objection that it may lead to difficulties arising from the complication of the rights and interests of other persons with those of the lender. And with regard to a reversion, it must be borne in mind that such an interest does not, till it falls into possession, yield any income, so that the mortgagee must in the interim rely entirely on the mortgagor's covenant for payment of his interest.

V.—Precautions to be observed on Advancing Trust Moneys on Mortgage.—Trustees lending on mortgage should be careful to acquire the legal estate in the mortgaged property (*b*). They are not justified in allowing trust funds to be secured upon an equitable deposit of deeds with or without an undertaking to execute a legal mortgage (*c*).

If an advance is made on the security of copyholds, trustees should not be content with a mere covenant to surrender, but should see that a surrender is actually made, thus entitling the

(*y*) *Langston v. Ollivant*, 6 Coop 33

(*z*) *Re Tucker*, *Tucker v. Tucker* (No. 2), (1894) 3 Ch 429, C A

(*a*) *Holmes v. Moore*, 2 Moll 328.

(*b*) *Norris v. Wright*, 14 Beav 30
See *Webb v. Jonas*, 39 Ch D. 660

(*c*) *Webb v. Ledsam*, 1 K & J 38
Swaffield v. Nelson, W. N. (1876) 251

to be admitted whenever admittance may seem necessary or expedient (*d*) CHAP XXIX

Investment upon a second mortgage is a breach of trust (*e*), Second mortgages
 not only because the legal estate is not acquired, but also because the trustees will not be entitled to the title deeds and will be exposed to the risk of foreclosure or of a forced sale by the first mortgagee to redeem whom no funds may be available. Second mortgagees are also exposed to the risk of tacking (*f*).

By the Improvement of Land Act, 1864 (*g*), it is enacted that a rentcharge created under that Act is not to preclude trustees of money, with power to invest the same on mortgage, from investing on the security of land so charged, unless the terms of the trust or power expressly prohibit an investment on security subject to any prior charge Trustees may lend on mortgage subject to improvement charges,

Charges under the Copyhold Acts (*h*) having priority over existing incumbrances do not render it necessary for trustees to call in moneys already invested or previously charged. — or charges under Copyhold Acts

A sub-mortgage is apparently a proper security for trust moneys, provided the trustees obtain the legal estate and are put into a position to exercise the powers arising under the original mortgage; they thus get the benefit of two several covenants for payment of the money (*i*). Sub-mortgages

Trustees are not justified, unless expressly authorized by the trust investment, in lending on a contributory mortgage, by taking a mortgage either in the names of themselves and other joint mortgagees, or in the name of a common trustee on behalf of all the mortgagees. both courses would result in the legal estate being vested not in the trustees alone, but either in them jointly with others or in a stranger, as the case might be; and might seriously hamper them in dealing with the security by sale or otherwise for the benefit of their *cestui que trust*, and the latter course would violate the rule that trusts must not be delegated (*k*). Contributory mortgages

(*d*) See *Wyatt v Sherratt*, 3 Beav 498

(*e*) *Robinson v Robinson*, 16 Jur 256, *Droser v Brereton*, 15 Beav 222, *Fowler v Reynal*, 3 Mac & G 500, *Lockhart v Reilly*, 1 De G & J 476

(*f*) See as to tacking, *post*, Chap LV sect 11 pp 1219 *et seq*

(*g*) 27 & 28 Vict c 114, s 61

(*h*) 15 & 16 Vict c 51, s 10, 21 & 22 Vict c 94, s 33

(*i*) *Smethurst v Hastings*, 30 Ch D 490

(*k*) *Webb v Jonas*, 39 Ch D 660
 See *Re Massingberd's Settlement*, 63 L T 296.

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Blending
appropriated
security with
other trust
funds

Where trustees have appropriated a specific security to answer a trust legacy, they are not justified in realizing that security and blending the proceeds with other trust funds by investing them on mortgages to answer the legacy and also the interests of other *cestui que trust* (l)

Mixing trust
funds

If a trustee mixes up trust funds with his own money so that the two cannot be accurately distinguished, he will be charged with the whole, except what he can prove to be his own (m).

Proviso that
principal shall
not be called
in for a speci-
fied time

In the case of a sale by trustees where, as is often advisable, part of the purchase-money is allowed to remain on mortgage, the trustees should be careful to take a legal mortgage for the money remaining unpaid; but they must not, unless expressly authorized so to do, bind themselves not to call in the mortgage before a specified time, for if the particular interest should determine before the period expires, the remainderman, if absolutely entitled, may call upon the trustee at once to pay over the principal (n)

Power of sale

Trustees should not, as a rule, lend on mortgage without acquiring a power of sale in case of default. Such powers were, till recently, inserted generally in mortgages, and are now impliedly imported into every mortgage deed unless expressly excluded (o)

Powers of sale, however, were not usually inserted in, and might now have to be excluded from, mortgages of long terms of years created by settlement or will for the purpose of raising portions, &c, which, in other respects, offer peculiar advantages for investment of trust moneys as usually offering ample security in point of value and as not being likely to be paid off (p). It has been held that it is not necessarily a breach of trust for a trustee to take a mortgage without a power of sale (q), and this decision might possibly be followed in the case of a mortgage of a portions term, though the statutory power of sale was excluded.

Stock
mortgage

A loan of the proceeds on mortgage, with a covenant by the mortgagor to replace a specified amount of stock instead of

(l) *Re Walker, Walker v Walker*, 59 L J Ch 306

(m) *Lupton v White*, 15 Ves 432,

Cook v Addison, L R 7 Eq 466

(n) *Vochery v Evans*, 33 Beav 376.

See also *Mant v Leith*, 15 Beav 524,

527

(o) 44 & 45 Vict c 41, s 19

(p) *Vaisey on Settlements*, p 455

(q) *Farrar v Barraclough*, 2 Sm & G

231, but see *Lochhart v Reilly*, 1 De G & J, 464.

repaying the cash advanced, is not a proper form of investment of trust moneys (*r*)

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Trustees lending on mortgage should not part with the money without being satisfied that the security has been executed and delivered over by the mortgagor. If trustees, instead of seeing themselves to the investment and the completion of the security, delegate that duty to their solicitor or agent, who misapplies the money, they will be liable to make good the loss to the trust estate (*s*)

Completion of security before the money is paid

Trustees investing in debentures or debenture stock of municipal corporations bought on the Stock Exchange may pay the money to the broker before receipt of the debentures or stock, and are not liable if he absconds with the money, but apparently the trustees would be liable, if they so parted with the money, knowing that the contract for a loan is to be made directly with the corporation (*t*)

Loss of trust moneys through fraud of broker

On completion of the security, trustees should be careful to see that not only the mortgage deed, but all the documents of title relating to the mortgaged property, are handed over to them (*u*).

Title deeds to be handed over

vi.—Valuation of the Property.—Trustees, when investing on mortgage security, must be careful to exercise proper discretion and caution in the choice of a particular security by satisfying themselves as to the sufficiency of the property in point of value, and by strictly investigating the title of the intending mortgagor. The burden of proof that the security is good lies upon the trustee (*x*); and he should therefore be careful to preserve evidence of the propriety of the transaction.

Inquiry into value and title

According to what was long the general understanding of the legal profession and the practice of the Court, "a trustee was held not to be justified in advancing money on property of permanent value (as freehold agricultural land) to the extent of two-thirds of the value of the property (*y*), but not more than

The "two-thirds rule" as to value

(*r*) *Whitney v Smith*, L R 4 Ch A 513. See *Pell v De Winton*, 2 De G & J 18, *Bromley v Kelly*, 39 L J Ch 274.

(*s*) *Rowland v Witherden*, 3 Mac & G 568, *Hanbury v Kirkbrand*, 3 Sim 265. See *Broadhurst v Balguy*, 1 Y C C 16, *Bostock v Floyer*, L R. 1 Eq 26.

(*t*) *Sneath v Gaunt*, 9 App Cas 1

Thompson v Funch, 8 De G M & G 560, *Re Dewar*, *Dewar v Brooker*, 54 L J Ch 830.

(*x*) *Stuckney v Sewell*, 1 My & Cr 8, 13, *Stretton v Ashmall*, 3 Drew 12.

(*y*) *Stuckney v Sewell*, *sup*, *Maulood v Annesley*, 16 Beav 600, *Ingle v Partridge* (No 2), 34 Beav 411, *Roddy v Williams*, 3 J & L 16, *Smethurst v Hastings*, 30 Ch D 490, 498, *Leasoyd v* 12 App Cas 727 733.

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half of the value if the property consisted of houses or buildings (z); and much less if of buildings depending for their value on the trade carried on there (a).

The "two-thirds rule," however, was not enforced with exact strictness (b); in applying the rule, the circumstances of the particular case might be taken into consideration (c); but a trustee who disregards the rule takes upon himself great risk (d).

Statutory
proportion of
value

The Trustee Act, 1888 (e), sect 4, relieved trustees from liability in respect of the proportion borne by the amount of the loan to the value of the property, provided they acted upon the report and under the advice of a surveyor or valuer, as prescribed by the Act, and that the amount of the loan did not exceed two thirds of the value of the property as stated in the report, whether the property was agricultural, or house, or other property on which the trustee might lawfully lend.

This enactment is repealed, but virtually re-enacted by the Trustee Act, 1893 (f), which enacts as follows:—

Loans and
investments
by trustees
not charge-
able as
breaches of
trust

Sect 8—" (1) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the Court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report "

Effect of
enactment

The requirements of this enactment, so as to entitle trustees to the protection thereby offered, seem to be as follows:—

Qualification
of valuer

First, trustees intending to lend money on mortgage must

(z) *Norris v Wright*, 14 Beav 291, *Stratton v Ashmall*, 3 Drew 9, *Macleod v Annesley*, 16 Beav 600, *Budge v Gummow*, L R 7 Ch A 719, *Hoey v Green*, W N (1884) 236, *Fry v Tapson*, 28 Ch D 268

(a) *Stickney v Seuell*, 1 My & Cr 8, *Stratton v Ashmall*, *supra*, *Royds v Royds*, 14 Beav 54, *Budge v Gummow*, *sup*, *Leaoyd v Whiteley*, 12 App Cas at p 738

(b) *Re Godfrey*, *Godfrey v Faulkner*, 23 Ch D 483

(c) *Re Olive*, *Olive v Westerman*,

34 Ch D at p 73 See *Re Pearson*, 51 L T 692

(d) *Re Salmon*, *Priest v Uppelby*, 42 Ch D 351, at pp 369, 370

(e) 51 & 52 Vict c 59 The Act applied as well to trusts created by instrument executed before as to trusts created after the passing of the Act See sect 12

(f) 56 & 57 Vict c 53 This enactment is retrospective, except where an action or proceeding was pending on the 24th of December, 1888 See sect 8 (4)

cause a report as to the value of the property to be made by a person whom they reasonably believe to be an able practical surveyor or valuer. The Act of 1888 abrogated the former rule that the person employed as a valuer was one having local knowledge of the district where the property forming the proposed security was situated (*g*); and the rule is now no longer in force under the present Act.

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Secondly, the person appointed by the trustees to value the property must be appointed on their behalf, and must be one whom they personally have reason to believe to be an able practical surveyor or valuer (*h*). The trustees should not leave the choice of the valuer to their solicitor, for it is no part of a solicitor's business to recommend a valuer (*i*).

Choice of
valuer

Thirdly, trustees cannot safely, under any circumstances, lend on a valuation made for the mortgagor (*h*); or employ a valuer who is in the employment of, or recommended by, the intending mortgagor (*l*). The trustees should not do anything which might cause the valuer to be influenced by the mortgagor, as by introducing the valuer to the mortgagor for the purpose of negotiating as to remuneration (*m*). The valuer's fee should be paid in the first instance by the trustees, and should be repaid to them by the mortgagor. The amount of the fee should not be made to depend upon the completion of the mortgage (*n*).

Valuer must
be independent of
mortgagor

Fourthly, the valuer must be "instructed" by the trustees, and they should accordingly inform the valuer that they are lending trust moneys, and that they do not desire to lend more than the proper proportion of the actual value of the property, and they should ask for a valuation which will enable them to judge whether they are justified in lending the amount they propose to lend (*o*). A valuation made for another purpose, especially if comprising other property, would be clearly insufficient to protect the trustees (*p*). The Act requires that, in order that the trustees may obtain the statutory protection, the advance shall be made "under the advice of the surveyor or

Valuer must
be informed
of purpose for
which report
is required

(*g*) See as to this rule, *Budge v Gummow*, L R 7 Ch A 719, *Fry v Tapson*, 28 Ch D 268.

(*h*) *Re Walker, Walker v Walker* (No 1), 59 L J Ch 386.

(*i*) *Fry v Tapson*, *supra*.

(*k*) *Walcott v Lyons*, 54 L T 786.

(*l*) *Norris v Wright*, 14 Beav 307, *Hoggood v Parkin*, L R 11 Eq 74.

(*m*) *Re Partington, Partington v Allen*, 57 L T 654.

(*n*) *Smith v Stoneham*, W N (1886) 178.

(*o*) *Re Olves, Olves v Westerman*, 34 Ch D 70, at p 73.

(*p*) *Re Walker, Walker v Walker*, 62 L T 449.

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valuer expressed in the report"; it is obvious that the surveyor or valuer cannot properly be asked to give such advice, unless he is informed of the fact that it is proposed to make the advance out of trust moneys; it is therefore advisable, though not expressly required by the Act, that a statement that the surveyor or valuer was informed of this fact should appear on the face of the report

Advice of
valuer as to
amount to be
advanced

Fifthly, the distinction formerly made as to what was a proper advance, according as the property was agricultural land, house property, or otherwise, is now done away with, and a uniform proportion of advance to value is laid down which must not be exceeded in any case. The report should therefore state the estimated value of the property forming the proposed security, and should expressly advise as to the amount which may be safely advanced upon the security, such amount not to exceed in any case two thirds of the value of the property as stated in the report. Where trustees obtained a report stating the estimated value of the property, but advising that the trustees might lend a larger proportion than two thirds of the value, it was held that the trustees, who made a larger advance accordingly, were not protected by this Act (*g*)

Liability of
valuer for
misleading
report

If a valuer is appointed and paid by trustees, and is informed of the purpose for which his valuation is required (*r*), but not otherwise (*s*), he will be held liable for reckless statements inducing a loan on a security which proves deficient

Neglect of
solicitor to
procure
proper
valuation

A client lending on mortgage by the advice of his solicitor, has a right of action against him for neglecting to procure an independent valuation (*t*); but in the case of a trust investment this is the right only of the trustees, not of the beneficiaries (*u*).

Trustee must
not be valuer

Trustees must not appoint one of themselves to make a valuation of a proposed mortgage security (*x*).

All the trustees must satisfy themselves as to the sufficiency of the security (*y*)

Depreciation
in value of
mortgaged
property.

Where trustees, acting upon the advice of competent persons, and in the *bonâ fide* exercise of their discretion as prudent men of

(*g*) *Re Somerset, Somerset v Earl Poulett*, W N (1893) 66, 160, C A

(*r*) *Cann v Wilson*, 39 Ch D 39, *Scholes v Brook*, W N (1891) 101

(*s*) *Le Lievre and Dennes v Gould*, (1893) 1 Q B 491.

(*t*) *Wood v. Jones*, 61 L T 551

(*u*) *Eae v Meeh*, 14 App Cas 558

(*x*) *Peters v Lewes and East Grinstead Rail Co*, 18 Ch D. 429, at p 439 (a case of a sale under the Lands Clauses Act)

(*y*) *Griffiths v Potter*, 25 Beav 236.

business, advance trust money on the security of property, the cases seem to show that they will not be held liable for subsequent depreciation of the value of the property (z). And now, by the Trustee Act, 1893, Amendment Act, 1894 (a), "A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law." But this enactment is not retrospective (b).

Duty of
trustees in
such cases

When property, on the security of which trust money has been advanced, falls in value, so that the mortgage debt comes to exceed two-thirds of the actual value of the property, it is not absolutely their duty at once to call in the mortgage; they should, as a general rule, require the mortgagor to reduce the amount due upon the mortgage, or to give additional security for the total sum advanced; and they may insist on calling in so much of the debt as is not covered by the security, though the tenant for life refuses the consent to change of investments required by the instrument creating the trust (c). But they have a discretion in the matter which they must exercise as prudent practical men with due regard to all the circumstances of the case, such as the solvency of the mortgagor, and the risk of the property being thrown on the hands of the trustees; in such a case the trustees may, by summons under Ord LV rule 3 (g), without asking for administration, obtain the directions of the Court as to what they ought to do as to calling in the mortgage (d).

It would seem that where trust money has been invested on mortgage of property, which becomes depreciated in value, the trustees are justified in their discretion in making such further advances out of the trust funds as may be necessary for maintaining or improving the mortgaged property, so as to secure the total amount advanced, and that they will not be liable if the result should disappoint their expectations; but the burden of proof lies on the trustees to show that they exercised due caution and judgment (e).

Advances for
maintenance
of inadequate
security

Trustees are not justified in calling in money invested on

Trustees
should not

(z) *Leao v yd v Whiteley*, 12 App Cas 727. See *Budge v Gummow*, L R 7 Ch A 719, *Re Olive, Olive v Westerman*, 34 Ch D 70.

(a) 57 Vict c 10, s 4.

(b) *Re Chapman, Cocks v Chapman*, (1896) 1 Ch 323, reversed on other points, (1896) 2 Ch 763, C A.

(c) *Harrison v Thozton*, 4 Jur N.S.

550. See *Thornton v Hawley*, 10 Ves 129, 137.

(d) *Re Medland, Eland v Medland*, 41 Ch D 476.

(e) *Collinson v Lister*, 20 Beav 356, affirmed on other points, 7 De G M & G 634. See *Vyse v Foster*, L R 7 H L 318, *Jesse v Lloyd*, W N (1883) 88.

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call in good
mortgage.

Right of
trustees to
indemnity

Apportion-
ment of
deficient
fund from
sale under a
mortgage
Extent of
the statutory
protection

Liability for
loss by reason
of improper
investments.

good and sufficient mortgage security, unless there are reasonable grounds for apprehending that it will fall in value, or unless the money is required for the purposes of the trust, or unless the calling in of the mortgage is for the benefit of all persons interested (*f*).

A trustee is bound to call in money outstanding on personal security when called upon to do so by his *cestui que trust*, without requiring any indemnity from them (*g*). Generally, however, trustees are not bound to take proceedings at their own expense, and without an indemnity from their *cestui que trust*, to recover trust property (*h*). In such a case, if the trustees refuse to sue, the *cestui que trust* may obtain leave to sue in the names of the trustees (*i*).

Where a tenant for life and remaindermen are entitled to an outstanding mortgage debt and arrears of interest, and the security realizes less than sufficient to pay the principal and interest in full, the amount, when received, must be apportioned (*l*).

It is to be observed that the protection afforded by the Act of 1893 (like the repealed Act of 1888) does not absolutely free from liability trustees from lending money upon the security of property, provided they comply with the statutory requirements, but only enacts that they shall not be "chargeable with a breach of trust by reason *only* of the proportion borne by the amount of the loan to the value of such property at the time the loan was made." The statute will not protect trustees from liability if the security is "one of a class which is attended with hazard" (*l*). The protection of the statute, provided its requirements are complied with, would appear to be complete; but the security must be, in other respects, one upon which trustees would have been justified in advancing money according to the principles of law hitherto recognized.

With regard to the liability of a trustee who advances more than the proper proportion, having regard to the value of the property, the Trustee Act, 1893, s 9 (re-enacting sect 5 of the repealed Act of 1888), enacts as follows:—

"(1) Where a trustee improperly advances trust money on a mort-

(*f*) *Howe v Lord Dartmouth*, 7 Ves 150, *Orr v Newton*, 2 Cox, 277, *Ames v Parkinson*, 7 Beav 379, 383, *Robinson v Robinson*, 1 De G M. & G 247, 263

(*g*) *Kirby v Mash*, 3 Y & C Ex 295

(*h*) *Annesley v Simeon*, 4 Madd 390, *Tredball v. Medhurst*, 36 W. R 386

(*i*) *Fletcher v Fletcher*, 4 Ha 67

(*k*) *Wilkinson v Duncan*, 23 Beav 469, *Earl of Chesterfield's Trusts*, 24 Ch D 643, *Re Foster, Lloyd v Carr*, 45 Ch D 629

(*l*) *Per Stirling, J*, in *Blyth v Fladgate*, (1891) 1 Ch. 337, at p 354 See *Re Salmon, Priest v Uppleby*, 42 Ch D 351.

gage security, which would, at the time of the investment, be a proper investment in all respects for a smaller sum than is actually advanced thereon, the security shall be deemed an authorized investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest

“(2) This section applies to investments made as well before as after the commencement of this Act, except where an action or other proceeding was pending with reference thereto, on the 24th day of December, 1888.”

A trustee will not be protected by this section from liability for breach of trust, unless the investment was proper in all respects, except as regards value, at the time when the money was advanced (*m*)

A retiring trustee does not, by transferring to new trustees a mortgage on which he has lent a larger sum than was justifiable, free himself from liability to be sued by the *cestui que trust* for any loss arising on a sale by the new trustees under their power as mortgagees, if fairly conducted; for the sale is under the power which the retiring trustee himself has given to the new trustees, by transferring the mortgage to them (*n*)

Liability of
retiring
trustee

vii.—Investigation of Title to the Property—The Trustee Title Act, 1893, s. 8 (3), re-enacting the provisions of the Trustee Act, 1888, s. 3 (3), which are repeated for the purpose of consolidation, enacts as follows —

“A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property, he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if, in the opinion of the Court, the title accepted be such as a person acting with prudence and caution would have accepted”

Acceptance of
short title

Formerly, trustees lending on mortgage could not with safety dispense with requiring a title going back less than forty years (*o*). Even now they may only accept a shorter title if they act with due prudence and caution, a matter which depends on the circumstances of each particular case. It is conceived that they should not accept a title commencing at a recent date, unless the property belongs to, or has lately been acquired from, persons of assured position.

(*m*) *Re Walker, Walker v Walker*, Ch D 351, 371, C A
59 L J. Ch 386 (o) *Exp Goven nor sof Chn ist's Hosp's al*,
(*n*) *Re Salmon, Priest v Uppleby* 42 2 H & M 166

CHAP XXIX

Investigation
of title

In every case the title should be carefully investigated, otherwise the trustees will be responsible if, through a defect in title, the security fails wholly or in part (*p*). The investigation of title is, however, within the ordinary scope of a solicitor's business, and it would seem clear that if a trustee acting *bona fide* under his solicitor's advice accepts a defective title, he will be protected (*q*).

Duty of
solicitor to
trustees

It is clearly necessary and proper for trustees, when proposing to invest trust money on mortgage security, for the protection both of themselves and their beneficiaries, to consult a solicitor with regard to the sufficiency in value and soundness of title of the property intended to be comprised in the security. The rule is thus stated by Stirling, J (*r*).—"A trustee cannot delegate the execution of the trust. All that he is entitled to do is to avail himself of the services of others wherever such employment is according to the usual course of business (*s*). It is, therefore, the duty of a solicitor not so much himself to form or express an opinion on the value of the property offered to a trustee as security for an advance (though the law does not prevent him from so doing if he thinks fit), as to see that the trustee has before him the proper materials for forming a judgment of his own. He ought, therefore, to see not only that the trustee has before him proper valuations of the property, but that he is made acquainted with any facts known to the solicitor, and not appearing by the valuations, which may affect the value of the property, and that his attention is directed to any rules laid down by the Courts for the guidance of trustees with reference to such matters."

Employment
of solicitor
who acts for
mortgagor

In investing trust moneys on mortgage, it is not unusual for trustees to employ the solicitor who acts for the mortgagor. This practice is, however, open to objection, both because of the inconvenience which may arise from the doctrine of implied notice, and because there is, in such a case, a conflict of duties on the part of the solicitor that he cannot adequately represent the interests of both lender and borrower (*t*). A solicitor who acts for both parties must not disclose to the proposed mortgagee any defect which he may find in the borrower's title (*u*), though

(*p*) *Lockhart v Reilly*, 1 De G & J 464.

(*q*) See *per* Lindley, L J, in *Speight v Gaunt*, 22 Ch D at p 761, and *per* Cotton, L J, in *Re Whiteley*, *Whiteley v Learoyd*, 33 Ch D at p 350.

(*r*) *Blyth v. Fladgate*, (1891) 1 Ch. 337, at p. 360.

(*s*) See *Learoyd v Whiteley*, 12 App Cas at p 734.

(*t*) *Lewin on Trusts* (9th ed.), 373, citing *Waring v Waring*, 3 Ir Ch R. 331, 336.

(*u*) *Taylor v Blacklow*, 3 Bing N. C. 235.

no doubt he would be justified, and indeed bound, to advise the mortgagee not to make the advance. It has been said that to employ the mortgagor's solicitor, though not absolutely amounting to a breach of trust, requires the trustee who does so to take additional precautions, and, in the case referred to, the trustee was held liable for the fraud of the solicitor (*v*).

CHAP XXIX

Trustees will be held liable for loss to the estate if they waive any material defect in the mortgagor's title (*w*) Waiving defect in title

If a further advance is made upon the security of property comprised in the security for the original loan, the subsequent title should be produced and investigated, so as to ascertain that there have been no intermediate dealings with the property, which might rank in priority to the further advance on the ground of implied notice (*z*) Fresh investigation on further advance

By sect 8 (2) of the Trustee Act, 1893, re-enacting sect 3 (2) of the Trustee Act, 1888 (which is repealed), it is enacted. — Lessor's title

“A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed wholly or partly with the production or investigation of the lessor's title”

Before the passing of the Act of 1888, trustees lending on leasehold security were bound to see that they acquired a marketable title, and accordingly could not waive their right to production of the lessor's title. Even now it would not be prudent for trustees to lend money on the security of a recently-granted lease, unless the title to the freehold is well known, or unless the title thereto is produced.

viii.—General Protection of Trustees —The Judicial Trustees Act, 1896 (*y*), after giving power to the Court to appoint a judicial trustee, enacts as follows — Jurisdiction of Court in cases of breach of trust

Sect 3 “(1) If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee, either wholly or partly, from personal liability for the same

“(2) This section shall come into operation at the passing of this Act”

^v (*v*) *Sutton v Wilders*, L R 12 Eq 373, at p 377. See *Fyler v Fyler*, 3 Bear 550.

(*w*) *Eastern Counties Rail Co v Hawkes*, 5 H L C 331, 333.

(*z*) *Hopgood v Parkin*, L R 11 Eq

74. (*y*) 59 & 60 Vict c 35. See *Re Turner, Barker v Iremey*, (1897) 1 Ch, 536.

CHAP XXIX

Notice of
trust to be
avoided

ix.—As to the proper Forms of Mortgages to Trustees and of Transfers thereof.—If a mortgagor paid off a mortgage debt, having notice that it was trust money, it was a settled rule of equity that he was bound in equity to see to its application, unless he was expressly or impliedly exempted from that obligation; but inasmuch as all trustees have now a statutory power to give receipts for funds belonging to them as such, so as to exonerate the person paying the same from seeing to the application thereof (z), the obligation referred to cannot now arise

Even so, however, a difficulty still occurs from the necessity of producing the settlement or will creating the trust to prove the fact, and of engrafting the proof on the title, to satisfy an assignee of the mortgage, as well as future purchasers. To obviate this latter inconvenience, the better practice is for the mortgagor to execute a mortgage to the executors, or trustees, without putting notice of the trust on the mortgage, and then for the executors or trustees to execute a separate declaration of their trust. To meet the former, it is advisable not to give the mortgagor notice of the fact of the money being in trust.

Joint mort-
gages to
trustees

But there is a further rule in equity, viz, that if two or more persons advance their own moneys on mortgage, whether in equal proportions or not, and the mortgage is limited to them so as to create a joint tenancy at law, nevertheless, in equity, they shall be considered as tenants in common, and there shall be no survivorship between them. The consequence is, that if a mortgage is made to two or more persons without notice of the trust on the face of the deed, so that they appear to have made advances of their proper moneys, and if one of them die before the mortgage money is paid off, the concurrence of the executor or administrator of the deceased mortgagee becomes necessary in the discharge. The contrary was held in one case (a), but it cannot be supported (b). This inconvenience has given rise to the practice of expressly stating that the money advanced belongs to the persons advancing it (naming them, but not describing them as trustees) "on a joint account" (c).

Effect of
advance on
joint account.

By the Conveyancing and Law of Property Act, 1881 (d), the effect of an advance on joint account is stated in sect. 61.

Sub-sect. (1) "Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obliga-

(z) 56 & 57 Vict. c. 53, s. 20, see ante, p. 420

(a) *Brasner v. Hudson*, 9 Sim. 1

(b) *Pickers v. Cowell*, 1 Beav. 529.

See *Steeds v. Steeds*, 22 Q. B. D. 537, 541

(c) See *Hind v. Poole*, 1 K. & J. 383.

(d) 44 & 45 Vict. c. 41

tion, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor, and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due notwithstanding any notice to the payer of a severance of the joint account "

CHAP XXIX

The joint receipt clause formerly in use was binding on the mortgagees, although they did not execute the mortgage deed ; and the same rule would clearly apply to a statutory declaration as to joint account.

Joint receipt clause

This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained, and applies only to a mortgage, or obligation, or transfer made after the commencement of the Act (e).

Application of the section

The question whether several mortgagees are to take as joint tenants or as tenants in common is one of intention, and, notwithstanding the insertion of a joint account clause, evidence is admissible to show that the mortgagees are entitled to the mortgage money as tenants in common (f).

Contrary intention

Although the adoption of the course above recommended obviates all inconvenience on payment off of the mortgage debt, or on transfer of the security before any change of trustees occurs, a difficulty must necessarily arise when the mortgage has to be transferred on an appointment of new trustees. The deed of transfer should be separate from, but executed contemporaneously with, the deed appointing the new trustee (g). Various expedients have been used to avoid disclosing the trust by the deed of transfer so as to put notice of the trust on the title. Some conveyancers introduce a declaration that the mortgagees are trustees, and have no beneficial interest, conceiving that this affirmation, which refers to no specific trust, would not render it incumbent on any person paying off the

Transfer of mortgage on change of trustees

(e) See sect 61, sub-sects (2), (3)

(g) See *Fowler v Reynal*, 3 Mac. &

(f) *Re Jackson, Smith v. Subthorpe*,
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G. 500, 507

CHAP. XXIX

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Even so, however, a difficulty still occurs from the necessity of producing the settlement or will creating the trust to prove the fact, and of engrafting the proof on the title, to satisfy an assignee of the mortgage, as well as future purchasers. To obviate this latter inconvenience, the better practice is for the mortgagor to execute a mortgage to the executors, or trustees, without putting notice of the trust on the mortgage, and then for the executors or trustees to execute a separate declaration of their trust. To meet the former, it is advisable not to give the mortgagor notice of the fact of the money being in trust

Joint mortgages to trustees

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The joint receipt clause formerly in use was binding on the mortgagees, although they did not execute the mortgage deed; and the same rule would clearly apply to a statutory declaration as to joint account. Joint receipt clause

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The question whether several mortgagees are to take as joint tenants or as tenants in common is one of intention, and, notwithstanding the insertion of a joint account clause, evidence is admissible to show that the mortgagees are entitled to the mortgage money as tenants in common (f). Contrary intention

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(g) See *Fowler v Reynal*, 3 Mac &

(f) *Re Jackson, Smith v. Subthorpe*, 34 Ch. D 732.

G. 500, 507.

CHAP XXIX

mortgage, to inquire into the nature of the trust (*h*); but having regard to the doctrine of constructive notice, it would clearly be unsafe to rely upon this expedient in practice (*i*). Others recite that the amount of the loan has been paid by the continuing and new trustees to the old trustees, a course open to the objection that the recital is at variance with fact. Others recite that the new and continuing trustees have become entitled to the amount of the loan and the securities for the same, and have required the transfer of the mortgage accordingly. But the fact that no consideration is mentioned for the transfer, is such as to create suspicion, and it is not clear that a subsequent purchaser would not be entitled to inquire how it was that the transferees became entitled to the mortgage moneys. The best method is to recite in the transfer that the old trustees are trustees of the moneys for the continuing and new trustees, to whom the moneys belong on a joint account, and who are desirous of having the securities for the same vested in them. This method is recommended by Mr Lewin (see Lewin on Trusts, 9th ed., p 367), and has been judicially approved by Pearson, J., as affording a protection to purchasers against any trusts affecting the property (*l*).

Vesting declaration on appointment of new trustee

By the 34th section of the Conveyancing and Law of Property Act, 1881 (*l*), it was provided that, on the appointment of a new trustee of a settlement or will made by deed after the 31st of December, 1881, the trust property, with certain exceptions, might be effectually vested in the new and continuing trustees by means of a vesting declaration. This section was repealed by the Trustee Act, 1893 (*m*), but re-enacted by sect 12 of that Act.

Exception as to transfers of mortgages of land, shares, stock, &c

But this enactment does not extend to land conveyed by way of mortgage for securing money subject to the trust, nor to any share, stock, annuity, or property transferable only in the books of a company or body, or in manner directed by or under Act of Parliament. A transfer of a legal mortgage of land must, therefore, still be effected by way of conveyance of the land to the transferee. And in the case of shares, stock, &c, the transfer must be according to the mode prescribed by the Companies Acts or other statute applicable to the particular case.

Mortgage by deposit of deeds

Where, however, the mortgaged land was not conveyed

(*h*) See Byth & Jarm Conv (3rd ed.) vol vi p 381.

(*i*) See *Jones v. Smith*, 1 Ph 244, *Brigman v. Gill*, 24 Beav 306.

(*k*) *Re Harman and Uzbridge Rail Co*, 24 Ch D at p 726.

(*l*) 44 & 45 Vict c 41.

(*m*) 56 & 57 Vict. c 53, s. 51.

originally, a vesting declaration will be sufficient to pass the estate therein. So, where a memorandum accompanying a deposit of deeds by way of mortgage contained a declaration by the mortgagor of trust of the legal estate, and the mortgagee appointed new trustees, it was held that a vesting declaration by the mortgagee in the deed of appointment operated under sect. 12 of the Act of 1893, to vest the legal estate in the trustees (*mm*)

Where a conveyance of mortgaged land is not obtainable on an appointment of a new trustee, a vesting order may generally be obtained which will have the same effect as if all proper conveyances of the land had been executed by all necessary parties (*n*)

Vesting
order

Where mortgages are taken by trustees, succession duty will not be payable on the death of one trustee; such accruer by survivorship will not be deemed a succession, mortgages being personal estate, and not within sect. 42 (*d*)

Succession
duty

SECTION II

OF MORTGAGES TO TRUSTEES OF CHARITIES.

i.—Of the Power of Charity Trustees to invest in or hold Real Securities under the Old Law —By sect 1 of the Mortmain Act, 9 Geo II c 36, s. 1 (*o*), all grants, transfers, and conveyances of lands or hereditaments, corporeal or incorporeal, and all charges or incumbrances thereon, in trust or for the benefit of any charitable use, were rendered void unless made in accordance with certain prescribed formalities and conditions, and unless the deed was made to take effect in possession and without any condition for the benefit of the grantor. The effect of this enactment was to render it incompetent for any corporation or trustees to invest charitable funds under their control on mortgage of lands except under the special provisions of some Act of Parliament or under licence from the Crown

Old Mortmain
Act

An exception from the operation of this enactment was by this Act made in favour of the Universities of Oxford and Cambridge and the colleges therein, and also the Colleges of Eton, Winchester and Westminster (*p*); and the exception

Exception
in favour of
universities,
&c.

(*mm*) *London and County Banking Co v Goddard*, W N (1897) 18
(*n*) 56 & 57 Vict c 53, ss 26 to 40
See *Re Harrison's Settlement*, W N. (1883) 31.

(*o*) Repealed and virtually re-enacted by the statute 51 & 52 Vict c 42
(*p*) 9 Geo II c 36, s 4, 51 & 52 Vict c. 42, s 7,

chap XXIX has been extended by subsequent statutes in favour of other institutions (*g*).

wer for
arity trus-
s to invest
mortgage

By 33 & 34 Vict c 34, s 1, all corporations and trustees in the United Kingdom, holding moneys in trust for any public or charitable purposes, may invest such moneys on any real security (which includes legal and equitable mortgages and charges upon lands or hereditaments of any tenure, or upon any estate or interest therein, or any charge or incumbrance thereon), authorized by or consistent with the trusts on which such moneys are held, without being deemed thereby to have acquired or become possessed of land within the meaning of the Mortmain Laws, or of any prohibition or restraint against the holding of land in any charter or Act of Parliament; and no contract for or conveyance of any interest in land, made *bond fide* for the purpose only of such security, shall be deemed void by reason of non-compliance with 9 Geo II c 36

Even before the passing of this Act, it was held that a proviso for redemption was not "a condition for the benefit of the grantor" within the Mortmain Acts (*r*).

Where the trust deeds of certain Methodist chapels contained powers of raising money for purposes of the trusts by mortgage, it was held that any of the trustees of the chapels might advance money on such mortgages and might exercise all the rights and remedies of mortgagees as against the trust estates (*s*).

Mortmain, &
Act, 1888.

The statute 9 Geo II c 36 is now repealed by the Mortmain and Charitable Uses Act, 1888 (*t*), which, however, imposes on dispositions of interests in land for the benefit of charities restrictions similar to those imposed by the repealed Act.

Licence in
mortmain.

A licence in mortmain or an Act of Parliament dispensing with such licence, though it enables a charity to take and hold land, does not enable a donor to give property to the charity which he could not otherwise give (*u*).

Testamen-
tary gifts of
mortgages

As regards testamentary dispositions in favour of charity, the effect of the statutory restrictions is that mortgages on land or any interest therein could not, prior to the 5th August, 1891, be made the subject of a bequest to charities or placed in mortmain.

(*g*) *Doe v Hawkins*, 2 Q B. 212

(*r*) See these statutes collected, Byth & Jarm Conv (4th ed) vol iv p 23, notes

(*s*) *Att-Gen. v Hardy*, 1 Sm. N S. 338

(*t*) 51 & 52 Vict c 42.

(*u*) *Mogg v Hodges*, 2 Ves Sen 52
See *British Museum v White*, 2 S & St 594, *Robinson v London Hospital*, 10 Ha 19, 24; *Nethersole v Indigent Blind School*, L. R. 11 Eq 1, *Chester v Chester*, L. R. 12 Eq 444; *Twocraft v Prudham*, 6 Ch D 205, *Webster v Southey*, 31 Ch D 9, 22.

All mortgages, including arrears of interest thereon, were within the mischief of the Mortmain Acts (*v*), also money secured by judgment (*w*), and money bequeathed to pay off an equitable charge on land (*v*), and money arising from the sale of partnership real estate (*y*); if not an interest in land, it is a direct charge thereon (*y*). So the lien of a vendor for his purchase-money (*s*), a bond with a deposit of title deeds (*a*), and a premium on a lease unpaid, is a lien on the leasehold, and within the Mortmain Acts (*b*). In fact any device by which land may be reached is void; thus a covenant that executors should pay a sum of money for charities, is within the Acts so far as relates to chattels real (*e*).

But where a person entitled to a sum under a covenant by her husband, declared by deed charitable trusts of the money, the trust was held valid, although the money could only be paid by calling in a mortgage of realty (*d*).

Many securities, not strictly mortgages of land, were issued under statutory powers by companies and corporations possessed of land, by which the undertaking and the rates and tolls thereof were charged, and it was contended that they constituted such an interest in land as to bring them within the Mortmain Acts. Charges on
tolls, &c

It had been held that shares in such a company or corporation did not fall within the statute, on the ground that the holder had no direct right to any part of the rates or tolls, only a share in the profits (*e*).

Instead of applying the same broad principle to the bonds and debentures of such companies and corporations, the Courts drew nice distinctions from the form of the securities, and attempted to reconcile the conflicting cases. It was thus doubtful how far mortgages, or debentures, or debenture stock, or assignments of tolls, or rates of railways, or other companies, were within the Acts. In some cases they had been held to be Debentures

(*v*) *Att-Gen v Meyrick*, 2 Ves Sen 44, *Jeffries v Alexander*, 8 H L C 594. See *Fox v Lovonds*, L R 19 Eq 456.

(*w*) *Collinson v Pater*, 2 R & M 344.

(*x*) *Waterhouse v Holmes*, 2 Sim 162.

(*y*) *Brook v Badley*, L R 3 Ch A 672, *Ashworth v Munn*, 15 Ch D 363, 370, C A.

(*z*) *Harrison v Harrison*, 1 R & M 71.

(*a*) See note (*v*), *ante*, p 358.

(*b*) *Shepherd v Beetham*, 6 Ch D 597.

(*c*) *Jeffries v Alexander*, 8 H L C 594.

(*d*) *Re Robson, Emley v Davidson*, 19 Ch D 156, C A, *Re Watts, Cornford v Elliott*, 29 Ch D 947, C A.

(*e*) *Myers v Perigal*, 2 De G M & G 599, *Re Langham's Trusts*, 10 Ha. 446.

within it, and void (*f*) In others they had been held not to be void (*g*)

A solution was found in the case of *Gardner v London, Chatham and Dover Railway Co.* (*h*), by which it was decided that a mortgage debenture made by a railway company in the form given in Schedule C of the Companies Clauses Consolidation Act, 1845 (*i*), does not give the debenture holder a specific charge upon the surplus lands of the company, or the proceeds of the sale of them, so as to entitle him to an order for a receiver of the sale moneys or interim rents. The conclusion from this case was, that the mortgagee has only a right to take the tolls, and has not an interest which is within the Mortmain Act (*k*) This view has been adopted in subsequent cases, and the question is now set at rest The principle is, that the holder of such securities has no interest in the land, but only a right, by receivership or otherwise, to the net earnings (*l*). If, on the other hand, the debenture assigns or charges the land itself, or tolls or rates charged thereon or some specific portion thereof, the security will confer an interest in land within the Mortmain Acts so as to avoid a charitable bequest of such a debenture (*m*)

A charge on police rates is not an interest in land, because, by the statute 7 & 8 Vict. c 33, the justices have no longer any power to levy a rate, but receive the money from the overseers of the poor, who raise it by rate or otherwise (*n*)

marshalling
favour of
charity

Marshalling is not allowed in favour of charitable bequests, where there is pure and impure personalty, so as to throw the debts, costs of suit and legacies upon the impure personalty, unless an intention so to marshal the assets can be gathered from the will (*o*); and where a charitable bequest so partially

(*f*) *Rex v Bates*, 3 Pri 341, *Finch v Squire*, 10 Ves 41, *Howse v Chapman*, 4 Ves 542, *Knapp v Williams*, 4 Ves 430, *n*, *Thompson v Kempson*, Kay, 592, *Chandler v Howell*, 4 Ch D 651, *Langham's Trusts*, *sup*, *Ashton v Lord Langdale*, 4 De G & Sm 402, *Ion v Ashton*, 28 Beav 372, *Jeffries v Alexander*, 8 H L C 594, *Cluff v Cluff*, 2 Ch D 222.

(*g*) *Walker v Milne*, 11 Beav 507, *Bunting v Marriott*, 19 Beav 163, *Doe v St Helen's Rail Co*, 2 Q B. 364, *Myers v Perigal*, 16 Sim 533, *Holdsuorth v Davenport*, 3 Ch D 185, *Mitchell's Estate*, 6 Beav 655

(*h*) 2 Ch 201.

(*i*) 8 & 9 Vict c 16

(*l*) *Holdsuorth v. Davenport*, 3 Ch D 651.

(*l*) *Attree v Hawe*, 9 Ch D 337, *C A*, *Re Christmas, Martin v Lacon*, 33 Ch D 332, *C A*, *Re Thompson, Bedford v Teal*, 45 Ch D 161, *C A*, *Re Parker, Wignall v Park*, (1891) 1 Ch 682, *Re Yebury's Estate*, *Ker v Dent*, 62 L T 55, *Re Pechard, Elmsley v Mitchell*, (1894) 3 Ch 704, *C A*

(*m*) *Re David, Buckley v. Royal National Lifeboat Institution*, 43 Ch D 27, *Re Holmes, Holmes v Holmes*, W N (1890) 169

(*n*) *Re Harris*, 15 Ch D 561 And see *Thompson v. Kempson*, Kay, 592, *Jervis v Lawrence*, 22 Ch D 202

(*o*) *Robinson v. Geldard*, 3 Mac & G 725, *Tempest v Tempest*, 8 De G M & G 359, *Gashin v Rogers*, L R 2 Eq 284, 288, *Beaumont v Oliveira*, L R 4 Ch A 369, *Wigg v Niscol*, L R 14 Eq. 92, M R.

fails, the proportion must be ascertained by the value of the pure and impure personalty at the death of the testator (*p*)

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Where a legacy to a charity is payable out of real and personal property, an apportionment must be made, and the legacy will be void *pro tanto* (*q*). But where a bequest to a charity is made of a legacy, or mortgage, charged on real and personal estate, there is no apportionment, and it is wholly bad (*r*)

Apportionment

ii.—Mortmain, &c., Act, 1891—The above remarks apply only to wills of testators dying before the 5th August, 1891. As regards wills made by persons dying on or after that date (*s*), the law with regard to testamentary gifts for charitable purposes has been materially altered by the Mortmain and Charitable Uses Act, 1891 (*t*). This Act enacts as follows:—

Alteration of the law as to testamentary gifts of land and interests therein.

Sect 3 “‘Land’ in the Mortmain and Charitable Uses Act, 1888, and in this Act, shall include tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land; and the definition of land contained in the Mortmain and Charitable Uses Act, 1888, is hereby repealed”

Meaning of “land”

Sect 4. “In this Act the word ‘assurance’ shall have the same meaning as in the Mortmain and Charitable Uses Act, 1888”

Meaning of “assurance”

By the last-mentioned Act the expression “assurance,” for the purposes of that Act, includes not only assurances by deed or other instrument operating *inter vivos*, but also devises, bequests, and other assurances by will or codicil (*u*)

The effect, therefore, of the exclusion from the above definition of “land,” for the purposes of both Acts, of money secured on land or other personal estate arising from or connected with land, renders impure personalty (other than leaseholds) capable of being freely and effectually given by will to charity. Thus, charitable bequests of money secured on mortgage of land, whether in fee or for years, or by deposit of title deeds, and of arrears of interest on any such mortgage, and of money charged by way of mortgage, or sums invested on any such mortgage, also charitable bequests of money secured by judgments charging land, or by vendor’s lien—all of which gifts were formerly void—are now rendered valid as regards wills of testators dying

Effect of definitions

(*p*) *Calvert v Armitage*, 1 H & M 446, correcting *Robinson v London Hospital*, 10 Ha 19, 29

(*q*) *Hill’s Trust*, 16 Ch D 173

(*r*) *Brook v Badley*, L R 3 Ch A. 672, *Re Watts, Conford v Elliott*, 29

Ch D 947, C A

(*s*) *Re Bridge*, *Brompton Hospital v Leuss*, (1894) 1 Ch 297, C A

(*t*) 54 & 55 Vict c 73

(*u*) 51 & 52 Vict c. 42, s 10.

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Testamen-
tary gift of
mortgage
valid

after the passing of the Act. So, also, a charitable gift may now be made by will of or out of the proceeds of land devised on trust for sale. And the fact that a sum of money bequeathed to charity is to be raised by sale of lands which have not been sold at the testator's death will not avoid the gift.

As regards the benefit of the security, when money secured by mortgage is given by will to charity, the position would now seem to be as follows.—The legal estate in the mortgaged land that is to say, the land itself at law, subject to the equitable right of redemption subsisting in the mortgagor, will immediately on the death of the testator vest in his "personal representatives," notwithstanding any expressions in the will purporting to devise such legal estate directly to the charity or to trustees for its benefit. But by the statute 33 & 34 Vict. c. 34, s. 1 (x), corporations and trustees holding money in trust for any public or charitable purpose are empowered to invest the same in real securities without being deemed thereby to have acquired or become possessed of land in mortmain. It would therefore seem that the executors may make a transfer of the mortgage security to the charitable legatee, and that the latter may accept such transfer, and continue to hold the security in accordance with the provisions of the last-mentioned Act; and further, that such a transfer will not require to be made with any of the formalities required by the Act of 1888 in the case of conveyances of land.

Testamen-
tary gifts of
debentures
valid

The recent enactment removes all doubt as to the validity of testamentary gifts to charitable uses of bonds and debentures secured by public bodies on rates or tolls, notwithstanding that such instruments amount to specific assignments of interests in land.

Marshalling
not now
necessary

It is obvious that the result of these changes in the law is to do away with the necessity of inserting in wills containing charitable gifts any direction for the marshalling of the testator's property for the purposes of such gifts. And, where a charitable legacy is given free of duty, the duty may now be paid out of impure personalty.

Gift of
mortgage
inter vivos
for charity

It is to be observed that the operation of the Act of 1891 is confined to testamentary dispositions, and that a gift *inter vivos* of money secured on mortgage of land or of other impure personalty to or for the benefit of charity, must still be made in accordance with sect. 4 of the Act of 1888 (y).

(x) See *ante*, p. 537.

(y) *Es Hume, Forbes v Hume*, (1891) 1 Ch. 422, C. A.

CHAPTER XXX

OF MORTGAGES TO BUILDING AND FRIENDLY SOCIETIES.

SECTION I.

OF MORTGAGES TO BUILDING SOCIETIES

i.—Power of Building Societies to lend on Mortgage—The Benefit Building Societies Act, 1836 (*a*), whereby societies of this nature were governed prior to the 2nd November, 1874, incorporated the Friendly Societies Acts then in force (*b*), so far as they were applicable; and this included the framing, certifying, and enrolling of rules (*c*)

As to unincorporated building societies

By the stat. 10 Geo IV c 56, s 21, all property (including securities for money) of friendly societies was vested in trustees, and, upon their death or removal, vested in the new trustees without assignment on conveyance. This provision is still in force as regards building societies which have not a certificate of incorporation under the Building Societies Act, 1874 (*d*).

Property vested in trustees

By the 6 & 7 Will IV. c. 32, benefit building societies were enabled to raise by the subscriptions of their members, by shares not exceeding the value of 150*l* for each share, such subscriptions not to exceed in the whole 20*s* per month for each share, a stock or fund for the purpose of enabling each member to receive out of the funds the amount or value of his or her share or shares, to erect or purchase dwelling-houses, or other real or leasehold estate, to be secured by way of mortgage to such society, until the amount or value of the shares advanced should have been fully repaid to such society with interest, and all fines or other payments in respect thereof; and no member was to receive from the funds any interest or dividend by way of annual or other periodical profit upon any shares, until the

Power to lend on mortgage under 6 & 7 Will IV c 32

(*a*) 6 & 7 Will IV c 32

(*b*) 10 Geo IV c. 56, 4 & 5 Will IV c 40 The statutes are now repealed See *post*, p 563

(*c*) See *Mulkern v Lord*, 4 App Cas 182

(*d*) 37 & 38 Vict c 42, s 7 See *ante*, p 460

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Form of mortgages	
Loans to strangers	There is nothing in this Act to prevent a society of this description from lending money on mortgage as well to its members as to strangers, without regard to the purpose for which it might be applied (<i>e</i>)
Shares not to exceed 150 <i>l</i>	No share must exceed 150 <i>l</i> in value, but any member may subscribe for and hold more shares than one, though the value of such shares exceeds in the whole the value of 150 <i>s</i> (<i>f</i>).
As to incorporated building societies	By the Building Societies Act, 1874 (<i>g</i>), the Act of 1836 is repealed, but so as not to affect any then subsisting society certified under the repealed Act, until such society has been incorporated under the later Act. All incorporated building societies, whether originally formed under the repealed Act or under the Act of 1874, are governed by the latter Act, as amended by subsequent Acts (<i>h</i>), and by regulations issued under sect 44 of the Act of 1874.
	By sect 13 of the Act of 1874, it is enacted as follows:—
Power to lend on mortgage under Act of 1874.	“Any number of persons may establish a society under this Act, either terminating or permanent, for the purpose of raising by the subscriptions of the members, a stock or fund for making advances to members out of the funds of the society, upon security of freehold, copyhold, or leasehold estate, by way of mortgage, and any society under this Act shall, so far as is necessary for the said purpose, have power to hold land with the right of foreclosure, and may from time to time raise funds by the issue of shares of one or more denominations, either paid up in full, or to be paid by periodical or other subscriptions, and with or without accumulating interest, and may repay such funds when no longer required for the purposes of the society. Provided always, that any land to which any such society may become absolutely entitled by foreclosure, or by surrender or other extinguishment of the right of redemption shall, as soon afterwards as may be conveniently practicable, be sold or converted into money.”
Terminating and permanent societies	By sect 5 of the Act, a terminating society in this Act means a society which, by its rules, is to terminate at a fixed date, or when a result specified in its rules is attained, a permanent

(*e*) *Cutbill v Kingdom*, 1 Exch 494
 (*f*) *Morrison v Glover*, 4 Exch 430,
 where Parke, B., admitted the incor-
 rectness of his dictum to the contrary
 in *Cutbill v Kingdom*, *sup*

(*g*) 37 & 38 Vict. c 42, s 7
 (*h*) 38 & 39 Vict c 9, 40 & 41 Vict
 c 63, 47 & 48 Vict c 41, 57 & 58
 Vict c 47

society means a society which has not, by its rules, any such fixed date or specified result at which it shall terminate CHAP XXX

The Act of 1836 does not notice the distinction between these two classes of societies, but many of the societies formed under that Act were terminating societies

By sect. 16 of the Act of 1874, the rules of every society thereunder shall contain among other particulars— What the rules are to contain

“(4) The terms upon which shares may be withdrawn, and upon which mortgages may be redeemed

“(8) Provision for an annual or more frequent audit of the accounts, and inspection by the auditors of the mortgages and other securities belonging to the society, and

“(11) Provision for the custody of the mortgage deeds and other securities belonging to the society”

Clause (4) of sect 16 of the Act of 1874 is repealed by the Building Societies Act, 1894 (i), and it is thereby enacted that the rules of every society established or substituting a new set of rules for its existing rules after the passing of this Act, shall set forth (among other particulars)—

“(e) The manner in which advances are to be made and repaid, the deductions, if any, for premiums, and the conditions upon which a borrower can redeem the amount due from him before the expiration of the period for which the advance was made, with tables, where applicable in the opinion of the registrar, showing the amount due from the borrower after each stipulated payment”

By sect 12 of the Act of 1894, balloting for advances is prohibited in the case of any society established after the passing of the Act; and existing societies, whose rules provide that advances may be ballotted for, may, notwithstanding anything in their rules, by a bare majority of members voting personally or by voting papers at a meeting called for the purpose, resolve to discontinue the practice Prohibition of ballot for advances

ii.—On what Securities Advances may be made—Building societies, as well under the repealed Act as under the present Acts, can only advance money on the security of landed property, freehold, copyhold or leasehold. An advance to a member on the security of his shares is invalid, and renders the directors making the advance liable for breach of trust (h). In Societies can lend only on real or leasehold securities

(i) 57 & 58 Vict c 47, s 28, and 2nd Sched. This Act came into operation on the 1st of January, 1895, except as otherwise expressed. See sect 30 of

the Act

(h) *Cullerne v London, &c Permanent Benefit Building Soc*, 25 Q. B. D. 485

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lending on the security of real or leasehold property, however, directors of building societies have a larger discretion than ordinary trustees, and are accordingly not under an obligation to avoid investments of a speculative or hazardous character; they may take collateral security for their loan on unauthorized property, as interests on personalty, but, if they do so, the propriety of the transaction must be tested independently of the collateral security (*l*)

Advance on
second
mortgage
prohibited

By sect 13 of the Act of 1894, building societies are prohibited from lending money on the security of a second mortgage, and directors who have authorized such an advance are made jointly and severally liable for any loss occasioned thereby to the society

Where a society was prohibited by its rules from lending on a second mortgage, and, being in want of money, induced a third person to lend to a mortgagor a sum of money, which was applied in reducing his mortgage debt, and, in order to secure this loan, the society postponed their first charge to the lender's security, it was held that the transaction was *ultra vires* and void (*m*).

Societies to
make annual
audits and
statements
of funds to
members.

iii.—Accounts and Audits of Mortgage Investments—The 40th section of the Act of 1874 provides that building societies shall make audits and annual accounts of (amongst other matters) their assets, including "the balance due or outstanding on their mortgage securities (not including prospective interest), and the amount invested in the funds or other securities; and every such account and statement shall be attested by the auditors to whom the mortgage deeds and other securities belonging to the society shall be produced, and such account or statement shall be countersigned by the secretary or other officer; and every member, depositor, and creditor for loans shall be entitled to receive from the society a copy of such account and statement, and a copy thereof shall be sent to the registrar within fourteen days after the annual or other general meeting at which it is presented, and another copy thereof shall be suspended in a conspicuous place in every office of the society under this Act."

(*l*) *Sheffield & South Yorks Permanent Building Soc. v. Aislewood*, 44 Ch D 412

(*m*) *Portsea Island Building Soc v. Barclay*, (1895) 2 Ch 298, C A

By sect 2 of the Act of 1894 it is enacted (sub-sect (1)), that every such account and statement shall be made up to the end of the official year of the society to which it relates, and shall be in the prescribed form; and the same sub-section further enacts as follows —

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Form of annual account and statement

“Provided that every such account and statement shall set forth —

(a) With respect to mortgages to the society upon each of which the present debt does not exceed five thousand pounds (not being mortgages where the repayments are upwards of twelve months in arrear, or where the property has for upwards of twelve months been in possession of the society), the number of all such mortgages, and the aggregate amount owing thereon at the date of the account or statement, such information being given separately in respect of each of the four following classes —

(i) Where the debt does not exceed five hundred pounds,

(ii) Where the debt exceeds five hundred pounds, and does not exceed one thousand pounds,

(iii) Where the debt exceeds one thousand pounds, and does not exceed three thousand pounds,

(iv) Where the debt exceeds three thousand pounds, and does not exceed five thousand pounds, and

(b) With respect to any other mortgage to the society, the particulars shown by the appropriate tabular form in the First Schedule to this Act

“(2) Every auditor, in attesting any such annual account or statement, shall either certify that it is correct, duly vouched, and in accordance with law, or specially report to the society in what respect he finds it incorrect, unvouched, and not in accordance with law, and shall also certify that he has at that audit actually inspected the mortgage deeds and other securities belonging to the society, and shall state the number of properties with respect to which deeds have been produced to and actually inspected by him

“(3) A copy of every such annual account and statement shall be sent to the registrar within fourteen days after the annual or other general meeting at which it is presented, or within three months after the expiration of the official year of the society, whichever period expires first

“(4) For the purposes of this section the expression ‘official year’ shall mean, in the case of any society established after the passing of this Act, the year ending with the thirty-first day of December, and, in the case of any society established before the passing of this Act, the year ending with the time up to which its annual account and statement is made at the passing of this Act

“(5) This section shall not come into operation until the expiration of twelve months after the passing of this Act”

iv.—Form of the Security —Benefit building societies generally consist of two classes of members, investing or unadvanced members, and borrowing or advanced members The purpose

Constitution and purpose of building societies.

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of such a society, whether terminating or permanent, is to promote the acquisition by its members of small freehold, copyhold, or leasehold properties for the erection of dwelling-houses thereon by raising, by means of small subscriptions, a fund divided into shares, out of which the society makes advances to members requiring such to the amount or value of their shares in the society, the advance being secured by mortgage to the society until the amount or value of the advanced members' shares, with interest and other payments, is fully paid (*n*) The inducement to investing members is the expectation of receiving a high return by way of interest on the amount contributed by them (*o*)—a consideration which was formerly of greater weight than now, inasmuch as loans by such societies to their members were not within the usury laws (*p*).

Form of
mortgage

The form of mortgage will depend upon the constitution and rules of the society In the case of a terminating society an advanced member receives in anticipation, subject to discount, an amount equal to the amount that the investing members will receive on the division of the assets at the termination of the society, the mortgage is, therefore, framed so as to secure not only the repayment of the sum advanced with interest, but the due payment by the advanced member of his subscription and other contributions, until payment of a sum equal to the full amount to which an investing member would be entitled in respect of his share, and also of a further periodical sum called "redemption money," but which is really interest Mortgages to permanent societies are generally framed so as simply to secure the repayment of the amount advanced, with interest, by equal instalments spread over a fixed period (*q*)

To whom the
mortgage
should be
made

If the society is not incorporated, the mortgage security must be taken in the names of its trustees (*r*) Where the mortgagor is one of the trustees of the society, the mortgage will be made to the other trustees and their successors (*s*) If the society is incorporated, the security is made to the society itself

(*n*) See 6 & 7 Will IV c 32, preamble, 37 & 38 Vict c 42, s 13 See also Wurtzburg on Building Societies, pp 1 *et seq*, 145 *et seq*

(*o*) *Per* Lord Cranworth, C, in *Fleming v Self*, 3 De G M & G 997, at p 1015

(*p*) *Silver v Barnes*, 6 Bing N C 180, *Burbidge v Cotton*, 5 De G & S. 17, *Doe v Glover*, 15 Q B 103

(*q*) Wurtzburg on Building Societies, p 145

(*r*) 10 Geo IV c 56, s 21, *ante*, p 543.

(*s*) See *Walker v Giles*, 6 C B. 662.

By the Act of 1874 it is enacted —

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Sect 19 "Any society under the Act, in a schedule to its rules, may describe the forms of conveyance, mortgage, transfer, agreement, bond, security for deposit, or loan or other instrument necessary for carrying its purposes into execution."

Forms of mortgage, &c

Sect. 27. "All rights of action and other rights, and all estates and interests in real and personal estate whatsoever [now (t)] belonging to or held in trust for any society certified under the said repealed Act (u) shall, on the incorporation of the society under this Act, vest in the society without any conveyance or assignment whatsoever, save and except in the case of stocks and securities in the public funds of Great Britain and Ireland, and estates in copyhold or customary hereditaments the title to which cannot be transferred without admittance"

Property to vest on incorporation

Sect 28 "Where any society under this Act is entitled in equity to any hereditaments of copyhold or customary tenure by way of mortgage, the lord of the manor of which the same are held shall from time to time, if required by the society, admit such persons, not more than three, as the society appoints, to be trustees on its behalf as tenants in respect of such hereditaments on payment of the usual fines, fees, and other dues payable on the admission of a single tenant, or may admit the society as tenant in respect of the same on payment of such special fine, or compensation in lieu of fine, and fees as may be agreed upon"

In case of copyholds

v.—Nature and Operation of the Security—Mortgages to building societies are governed by the ordinary law of mortgage, except so far as such law is necessarily modified by the special nature of the security, or by statutory enactment But it is not clear whether a building society may transfer its securities like any ordinary mortgagee (v).

Ordinary law of mortgage applies

The form of the foreclosure decree in the case of a mortgage to a building society is similar to that in ordinary mortgages (w)

Foreclosure

Where, however, the mortgage is in the form of a trust for sale to secure the repayment of the loan, the proper remedy will be an order for sale and not foreclosure (x)

Trust for sale

As to foreclosure or sale where the security is by a charge registered under the Land Transfer Act, 1875, see the provisions of that Act (y)

Registered mortgage

A building society is entitled as of right, like any ordinary

Costs

(t) This section is to be read as if the word "now" were omitted therefrom see 40 & 41 Vict c 63, s 3

(u) *I e*, the statute 6 & 7 Will IV c 32 see ante, p 544

(v) Compare *Ulster Building Soc v Glenton*, 21 L R Ir 124, and *Re Rumney and Smith*, 66 L J Ch 482

(w) *Provident Permanent Building Soc v Greenhill*, 9 Ch D. 122, *Bell v*

London and South Western Bank, W N (1874) 10, for a form of foreclosure order as to accounts, see *Boney v Chanter*, W N (1887) 52

(x) *Kirkwood v Thompson*, 2 H & M 392, 402 See *Locking v Parker*, L R 8 Ch A 30, *Re Alston, Johnson v Mounsey*, 11 Ch D 284

(y) 38 & 39 Vict c 87, ss 26, 27. See ante, p. 39.

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mortgagee, to its costs in an action for foreclosure or redemption in the absence of vexatious or oppressive conduct on its part (z).

It is, however, obvious that the position of a mortgagor to a building society is by no means the same as that of an ordinary mortgagor, and that his rights must be more or less affected by the contract of membership, as well as by the contract of mortgage (a).

Terms of
redemption

The terms on which an advanced member of a building society is entitled to redeem his mortgage will depend as well on the rules of the particular society as on the provisions contained in the mortgage deed (b).

If the terms of the mortgage deed vary from the rules of the society, and the mortgagor claiming to redeem does not seek to have the deed reformed, he is bound by its terms (c).

In the case of a permanent society, if the rules are unambiguous, there is no great difficulty in estimating how much the mortgagor ought to pay to entitle him to redeem. But questions have not unfrequently arisen as to the proper terms of redemption in the case of terminating societies, owing to the difficulty of calculating the probable duration of the society.

Right to
redeem of
member of
terminating
society

Where a mortgage had been duly executed by a member (who had become the purchaser of twelve and a half shares) of the property that he purchased with the sum advanced by the society for that purpose, a question arose whether the mortgagor had a right to have the accounts taken on the common principle of debiting him with the principal sum advanced and interest, and crediting him with the amount of his monthly subscriptions and payments, or on the principle of treating him as a shareholder, who had received the value of his shares in advance, and who was bound to continue his monthly payments during the continuance of the society; and the Court, on the construction of the mortgage deed, held the latter principle to be the correct one, and directed the master to find the amount of the future payments, upon a calculation of the probable duration of the society, though the rules of the society were ambiguous on the point (d). And, in a similar case, the mortgagor was, on the

(z) *Cottenell v Stretton*, L R 8 Ch A 295

(a) *Per Fry, J*, in *Rosenberg v Northumberland Building Soc*, 22 Q B D 378, at p. 380.

(b) *Andrews v City Permanent Building Soc*, 44 L T 641

(c) *Mosley v Baker*, 3 De G M & G 1032, n

(d) *Mosley v. Baker*, *sup*

same ground of construction, held bound to pay the full amount of all future payments which might become due during the probable duration of the society, in order to redeem (e). The agreement in the rules for acceleration of all such future payments, if *any* instalment is not punctually paid, has nothing in common with a penalty (f).

In a suit for redemption by a member, a decree was made directing calculation of the longest possible duration of the society at the date of the notice of redemption, having regard to the net assets of the society, and to the monthly subscriptions and redemption money still continuing payable, and to the number of 100l shares to be provided for, and charging the plaintiff as a present debt with all subscriptions and redemption money which would become payable by him assuming the society to endure for the whole of the calculated period, and crediting him with the amount of bonus payable at the date of the notice to withdrawing members (g). In such a case, the mortgagor is entitled to credit for redemption moneys paid in by him (h).

No allowance will be made to the mortgagor in respect of profits, where the redemption takes place at a period at which a withdrawing member could have obtained by the rules no right to profits; but profits will be allowed if by the rules the advanced members are entitled on redemption to the same profits as withdrawing members (i), although the amount was a greater sum than the society's funds could bear (i).

An advanced member was held to be entitled to redeem on payment of his subscriptions to the end of the year, estimated as the probable duration of the society, although he continued liable to pay subscriptions until 120l. a share had been realized for every member, and the society was not allowed to retain the deeds as a security for such subscriptions (k).

Where an executor of a will obtained a loan from a building society of which he was a member, for the purposes of the administration of his testator's estate, on a mortgage of a house belonging to that estate, and the deed contained a covenant by the executor to pay principal and interest, and all subscriptions,

(e) *Seagrave v Pope*, 1 De G M & G 783

(f) See *Wallingford v Mutual Soc*, 5 App Cas 685

(g) *Fleming v Self*, 3 De G M & G 997.

(h) *Smith v Pilkington*, 1 De G F & J 120

(i) *Fleming v Self*, *sup*, *Ascher v Harrison*, 7 De G M & G 404

(k) *Sparrow v Farmer*, 26 Beav 511, *Handley v Farmer*, 29 Beav 362

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finer, &c, and a proviso that the mortgage should not be redeemable except on redemption of all other mortgages made by him to the society, it was held that, as against the estate, no liability in respect of the shares could be enforced, and that the consolidation clause was void, but that the mortgage was good to the extent of the money actually advanced, and reasonable interest (*l*).

Where, by the rules, the manager had power to determine the amount payable on redemption, on payment of which the shares in respect of which the security was made should be extinguished, and the society, by resolution, fixed that amount at 60% 10s per share, it was held that a mortgagor who had by the deed covenanted to pay all subscriptions, &c, which should become due by virtue of the rules of the society, and had paid the amount fixed by the resolution, and had obtained a statutory receipt, was released from all liability to the society (*m*).

Fines

The Act of 1836 (*n*) empowers unincorporated societies to impose and inflict such reasonable fines, &c, upon members who offend against the rules; and the Act of 1874 (*o*) provides that the rules shall set forth (among other particulars) the fines to be imposed on members of the society. Fines are frequently made payable on default in payment by advanced members of instalments of their loans, but such fines must be reasonable, otherwise they will not be enforced (*p*).

Rules of a society imposing fines in case of repayments by borrowing members being in arrear, will not (when admitting a different construction) be construed so as to authorize fines cumulative in arithmetical progression (*q*).

Interest on fines.

In taking the accounts in an action for redemption or foreclosure, fines secured by the mortgage may be treated as principal, and so carry interest, if the terms of the security so provide (*r*). But such fines are of the nature of interest for non-payment of instalments of the loan, and accordingly, if neither the mortgage deed nor the rules of the society provide

(*l*) *Thorne v Thorne*, (1893) 3 Ch 196

(*m*) *Priestley v Hopwood*, 12 W R 1031

(*n*) 6 & 7 Will IV c 32, s 1

(*o*) 37 & 38 Vict c 42, s 16

(*p*) *Lovejoy v Mulkern*, 46 L J. Ch.

630 See also *Parker v Butcher*, L R 3 Eq 762, *Pulkington v Baker* (No 2), W N (1877) 210

(*q*) *Re Tierney*, Ir Rep 9 Eq 1

(*r*) *Provident Permanent Building Soc v Greenhill*, 9 Ch D 122. See *Clarkson v Henderson*, 14 Ch. D 348.

for payment of interest on fines, such interest cannot be allowed, as to do so would be to give compound interest, which is contrary to the rules of equity in the absence of express agreement (s)

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Where, according to the rules, premiums payable in advance might be added to the mortgage, and, by the terms of the mortgage deed, annual premiums of a specified amount per share were to be paid, it was held that the premiums were to be treated as capital, and that interest was properly chargeable thereon without allowing any rebate for payment of premiums contracted to be paid (t)

Premiums

A premium is not in the nature of interest, and, accordingly, a building society may prove in bankruptcy for future premiums, notwithstanding the rule that there can be no proof for interest after the date of the bankruptcy (u)

Proof in bankruptcy

Where the mortgage deed provided that, on default and sale, the trustees might retain out of the sale moneys all fines, subscriptions, and payments thereafter to become due during the period stipulated, as then immediately due, they were not entitled to retain interest after repayment of the principal, because interest is only due in respect of forbearance (x)

Right to interest

Where the rules authorize the allowance of a discount upon subscriptions upon redemption by a member before the time, such discount is not allowed on a compulsory sale (y)

Discount

Where a mortgage was made to a building society to secure the repayment of the principal by instalments and interest and "all subscriptions and other moneys becoming due," and the mortgagor assigned the equity of redemption, and afterwards embezzled moneys of the society received by him as secretary, it was held that the words "other moneys" in the mortgage deed must be read as *ejusdem generis* with the foregoing words, and as limited to sums due in respect of the mortgage, but not so as to render the assignee liable, in order to redeem the mortgage, to pay the amount due from the mortgagor as secretary which arose out of a different contract (z)

Mortgage to secure subscriptions and "other moneys"

(s) *Parker v Butcher*, L R 3 Eq 762, *Ingoldby v Riley*, 28 L T 55

(t) *Harvey v Municipal Permanent Investment Building Soc*, 26 Ch D 273

(u) *Exp Bath, Re Phillips*, 22 Ch D 450. As to this rule in bankruptcy, see *post*, p 1091.

(x) *Exp Osborne, Re Goldsmith*, L R 10 Ch A 41

(y) *Matterson v. Elderfield*, L R 4 Ch A 208. See *Re O'Donohoe's Estate*, Ir R 10 Eq 221

(z) *Bailes v Sunderland Equitable Industrial Soc*, W N (1886) 191.

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Mortgage by
joint stock
company.

It has been held that a company cannot hold shares in an unincorporated building society, and, accordingly, that if a company gives a mortgage in the ordinary form to such a society, they are entitled to redeem on the footing of an ordinary mortgage (*a*). But this decision turned entirely on the language of the Act of 1836 (*b*); and the question whether a joint stock company can become a member of a society incorporated under the Act of 1874 has not yet been decided. Sir J. Chitty, J., has expressed his opinion, though in a case where the point did not require decision, that a company, authorized by its memorandum of association to acquire shares in other companies, might become a member of an incorporated building society (*c*).

Provision for
immediate
payment
of future
instalments
on default.

Where a mortgage deed contained a provision that, on default in payment of instalments, the mortgaged property might be sold, and that on any sale all the future instalments should be immediately payable and retainable out of the proceeds of sale, subject to such discount as the directors might think fit to allow, with a covenant by the mortgagor to pay the instalments, it was held that the provision amounted to a personal covenant by the mortgagor that, on default in payment of the instalments, he would pay the whole sum remaining due, subject to the allowed discount (*d*). Such a provision is not of the nature of a penalty (*e*).

Continuance
of subscrip-
tions after
advance

Generally, an advanced member of a permanent society is required only to pay the prescribed instalments, and not also to continue to pay subscriptions after the advance, but it would seem that if the rules otherwise provide, the society will be entitled to enforce the payment of such subsequent subscriptions and to treat them as part of the security for the advance (*f*).

By sect 30 of the Act of 1874, if an advanced member of an incorporated society died intestate leaving an infant heir, the society, after selling the mortgaged premises, may pay to the administrator any surplus proceeds of sale to the amount of

(*a*) *Dobinson v Hawkes*, 16 Sim. 407

(*b*) See 6 & 7 Will IV c 32, s 1

(*c*) *Bristol and Clifton Permanent Building Soc v Hasboun*, cited in *Wurtzburg on Building Societies* (3rd ed.), at p. 143. As to the meaning of "person" in Acts of Parliament, see

Pharmaceutical Soc v London and Provincial Supply Assoc, 5 App Cas 857

(*d*) *Sheariff v Glenton*, 28 L T 65

(*e*) *Protector Endowment Loan and*

Annuity Co v Grace, 5 Q B D 592
(*f*) *Moxon v Berkeley Mutual Benefit Building Soc*, 59 L J Ch. 524

1501, to be considered as personal estate and liable to duty accordingly CHAP XXX

The question has been raised in several cases how far an advanced member of a building society is bound by any alterations of the rules which may be made subsequently to the date of the loan. It is apparent that the rights of the member in respect of his mortgage are affected by his contract of membership; and further, that the contract of membership carries *in gremio* the right of the society to alter its rules from time to time (g). It would thus appear that an advanced member would be bound by subsequent alterations of the rules, even though his position in regard to the security should thereby be altered to his detriment. And such appears to be the general rule, at all events where the covenant in the mortgage is to pay what shall be due according to the rules "for the time being."

Alteration of rules subsequently to advance

The decision of Hall, V-C, in *Smith's Case* (h), is apparently inconsistent with the above principle, but, so far as it is so, it must be regarded as overruled by the decision of the Court of Appeal referred to below. In *Smith's Case*, however, the language both of the covenant and of the altered rules was somewhat restricted. The covenant was to pay, *at the times and in manner* prescribed by the rules for the time being, the sums payable periodically by way of subscription or otherwise. The altered rules, whereby members were to become liable to pay additional sums as contribution for losses, provided, "so far as the rules of law and equity should permit," such rules should apply to all members and transactions as well past as future. It was held that an advanced member was entitled to redeem without payment of the additional sum.

Altered rules held not to bind mortgagor on construction of deed and rules.

In *Wilson v Miles Platting Building Society* (i), by the rules in force at the date of the mortgage, advanced members were not liable to contribute to losses of the society. The mortgage contained a covenant to pay "all subscriptions and contributions, interest, fines, premiums of insurance, and other moneys which, according to the rules for the time being of the society and the provisions herein contained, shall from time to time become due and payable, and which ought to be done and performed by the mortgagor." The proviso for redemption was

Altered rules bind mortgagor generally

(g) *Per Fry, L J, in Rosenberg v Northumberland Building Soc*, 22 Q B D at p 380, C A. (h) 1 Ch D 481. (i) 22 Q B D 381, n, C A.

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expressed in similar terms. The rules of the society were subsequently altered, and the directors were empowered to charge a member paying off any share in respect of which an advance had been made with such a sum in respect of such share as would, *pro rata* with other subscriptions and paid-up shares, be sufficient to cover any loss or anticipated loss to the society. It was held by the Court of Appeal that the mortgage was subject to the altered rule, and was redeemable only on the footing of that rule. Sir H Cotton, L J, pointed out that in *Smith's Case* (g), the covenant in terms contemplated only that the time and manner of payment might be from time to time varied, and did not refer to additional sums which might be prescribed by the rules for the time being, and further, that the application of the altered rules was qualified by making them applicable only "so far as the rules of law and equity would permit." His lordship said that if the decision of Sir C Hall, V-C, in that case meant that, generally, rules made after the date of a security would not apply, he should differ from that view.

The case of *Rosenberg v Northumberland Building Society* (h) was very similar to the case of *Wilson v. Miles Platting Building Society*, and the Court of Appeal considered themselves bound by and followed the decision in that case.

In *Bradbury v. Wild* (i), Kekewich, J, applied the principle of the decisions in the last two cases in a case where the mortgage did not refer to the rules "for the time being."

The registrar's certificate is conclusive as to the validity of the proceedings of the society in the matter of altering the rules (j).

Rights of
mortgagors
on winding up
of societies

Where the surveyor of a building society purchased land from the society, and executed a mortgage in ignorance of a recital therein that he was a member of the society, he was held not to be a contributory on the winding up of the society (k).

Under the winding up of a building society, where there are no creditors other than members, an advanced member can pay up his loan and be discharged as a contributory (l).

Where all outside debts have been paid, and a mortgagor, being an advanced shareholder, is under the rules of redemption

(g) 1 Ch D 481

(h) 22 Q B D 373

(i) (1893) 1 Ch 377

(j) *Deuchurst v Clarkson*, 3 E & B* 194, *Rosenberg v Northumberland Build-**ing Soc*, *sup*(k) *Empton's Case*, L R 9 Eq 597(l) *Brownlie v. Russell*, 8 App Cas. 235.

to cease to be a member of the society, he is not liable to contribute to a call on winding-up of the society for the purpose of satisfying the claims of the unadvanced shareholders (*m*), but he is liable on his covenant to pay subscriptions, though he cease to be a member before they fall due (*n*)

Where, however, claims of outside creditors remain unsatisfied, an advanced member, having a right to redeem on payment of all subscriptions, fines, and other sums payable under the rules, is not, by such payment, relieved from his liability to contribute to the payment of the outside debts on the winding-up of the society, but must contribute *pari passu* with the unadvanced members (*o*)

Upon the winding up of a benefit building society, the rules of the society still continue in force (*p*).

Paid-up shares at interest, with the right to withdraw the money in preference to the ordinary unadvanced members, are legal; they are not loans by the society, but like preference shares, and the holders will be entitled, in the winding up of the society, to be paid in preference to other unadvanced members (*q*)

Sect 32 of the Act of 1874 provides that a society may be dissolved with the consent of three-fourths of the members, holding not less than two-thirds of the shares, by an instrument of dissolution, which is to set forth certain prescribed particulars and to be duly registered.

Proceedings
for dissolution
of society

Such an instrument of dissolution does not operate so as to compel advanced members, whose loans are by the rules repayable by instalments, to pay up forthwith the balances due on their securities (*r*). Until recently, a winding-up order made by the Court apparently operated as a compulsory withdrawal, and, consequently, under such an order, an advanced member could be called upon to pay the same amount as would be due from him, if at the date of the order he had sought to redeem his advance (*s*)

(*m*) *Re Doncaster Permanent Building Soc*, L R 3 Eq 158

(*n*) *Farmer v Giles*, 5 H & N 753

(*o*) *Re West London, &c, Building Soc*, (1894) 2 Ch 352

(*p*) *Re Blackburn and District Benefit Building Soc*, 24 Ch D 421, C A

(*q*) *Re Guardian Permanent Benefit Building Soc*, *Scott's Case*, 23 Ch D

453, affd on appeal, *sub nom Murray v Scott*, 9 App Cas 519

(*r*) *Kemp v Wright*, (1895) 1 Ch 121, C A

(*s*) *Brownlie v Russell*, 8 App Cas 235, *Tosh v North British Building Soc*, 11 App Cas 489 See *London Provident Building Soc v Morgan*, (1893) 2 Q B 266

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Now, however, by sect. 10 of the Act of 1894, it is enacted that —

Liability of
borrowing
members in
event of
dissolution

“When a society under the Building Societies Acts is being dissolved or wound up, a member to whom an advance has been made under any mortgage or other security, or under the rules of the society, shall not be liable to pay the amount payable under the mortgage or other security, or rules, except at the time or times and subject to the conditions therein expressed. This section shall come into operation immediately after the passing of this Act.”

This section applies to a society the dissolution of which was begun before, but was not completed at, the time when the section came into operation (t).

As to un-
incorporated
societies

vi.—Arbitration.—By sect. 27 of the statute 10 Geo. IV c 56 (incorporated in the statute 6 & 7 Will IV. c 32, and, consequently, still in force as to unincorporated building societies), it is provided that disputes between a society and its members are to be settled by arbitration if so determined by the rules thereof

As to in-
corporated
societies

By sect. 34 of the Building Societies Act, 1874 (u), the rules of a society under this Act may direct disputes to be referred to arbitration.

What dis-
putes are
referable to
arbitration

With regard to unincorporated societies, it has in numerous cases been decided that the provisions in the rules for arbitration of disputes do not apply to redemption suits, because no means are provided for working out a decree for redemption, delivery of deeds, and consequential directions, and therefore the jurisdiction of the Courts is not interfered with (x).

But this rule was held not to apply in the case of an incorporated society, and accordingly, where an advanced member of such a society, wishing to sell his mortgaged property, commenced an action for an account against the society, it was held that the jurisdiction of the Court was ousted, and that the matters must be referred (y).

(t) *Kemp v Wright*, (1895) 1 Ch 121, C A. The effect of the enactment is to abrogate, in cases falling within it, the decision in *London Provident Building Soc v Morgan*, (1893) 2 Q B 266.

(u) 37 & 38 Vict c 42.

(x) *Fleming v Self*, 3 De G M & G 997, *Reg v Trafford*, 4 E & B 122, *Morrison v Glover*, 4 Exch 430, *Farmer v Giles*, 5 H & N 753, overruling *Rees v White*, 16 Jur 637, Q. B.; *Mulkern v Lord*, 4

App Cas 182. But see *French v Municipal Permanent Building Soc*, W N (1884) 105 (fraud).

(y) *Wright v Monarch Investment Soc*, 5 Ch D 726. See also *Huckle v Wilson*, 26 W R 98, *Thompson v Planet Building Soc*, L R 15 Eq 333, *Hack v London, &c Building Soc.*, 23 Ch D 103, C A., *Municipal Permanent, &c Soc, Kent*, 9 App Cas 260, *ass Selborne*, L C.

Now, however, by the Building Societies Act, 1884 (s), it is enacted as follows:—

“The word ‘disputes’ in the Building Societies Acts [1874 to 1884], or in the rules of any society thereunder, shall be deemed to refer only to disputes between the society and a member, or any representative of a member, in his capacity of a member of the society, unless by the rules for the time being it shall be otherwise expressly provided, and, in the absence of any such express provision, shall not apply to any dispute between any such society and any member thereof, or other person whatever, as to the construction or effect of any mortgage deed, or any contract contained in any document, other than the rules of the society, and shall not prevent any society, or any member thereof, or any person claiming through or under him, from obtaining in the ordinary course of law any remedy in respect of any such mortgage or other contract to which he or the society would otherwise be by law entitled”

Definition of word “disputes” in Act of 1884

To bring a dispute within the arbitration clause, it must be one which arises between the trustees and a person whose claim to be a member of the society is not in dispute (a).

vii.—Reconveyance.—By sect 5 of the Benefit Building Societies Act, 1836 (b) (which is still in force, notwithstanding the repeal of the Act, as regards societies formed under that Act and not having obtained a certificate of incorporation under the Building Societies Act, 1874 (c)), it was enacted that it should be lawful for the trustees named in any mortgage made on behalf of such societies, or the survivors or survivor of them, or for the trustees for the time being, to indorse upon any mortgage, or further charge, given by any member of such society to the trustees thereof for moneys advanced by such society to any member thereof, a receipt for all moneys intended to be secured by such mortgage or further charge, which should be sufficient to vacate the same, and vest the estate of and in the property comprised in such security in the person or persons for the time being entitled to the equity of redemption, without it being necessary for the trustees of any such society to give any reconveyance of the property so mortgaged, which receipt should be specified in a schedule to be annexed to the rules of such society duly certified and deposited as aforesaid (d)

Statutory receipt under Act of 1836

(a) 47 & 48 Vict c 41

(b) *Prentice v Loudon*, L R 10 C P

679 (c) 6 & 7 Will IV c 32.

(c) 37 & 38 Vict c 42 A form of receipt is given in the Schedule to the Act

(d) See *ante*, p 544.

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Statutory
receipt under
Act of 1874

By sect 42 of the Act of 1874 (by which all incorporated building societies are governed, whether formed under this Act or formed under the repealed Act, and having obtained a certificate of incorporation under this Act), it is enacted as follows:—

“When all moneys intended to be secured by any mortgage or further charge given to a society under this Act in England or Ireland have been fully paid or discharged, the society may indorse upon or annex to such mortgage or further charge a reconveyance of the mortgaged property to the then owner of the equity of redemption or to such persons and to such uses as he may direct, or a receipt under the seal of the society countersigned by the secretary or manager in the form specified in the schedule to this Act, and such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption, without any reconveyance or re-surrender whatever, and if the said mortgage or further charge has been registered under any Act for the registration or record of deeds or titles, the registrar under such Act, or his deputy or assistant registrar, or the recording officer, as the case may be, or, in the case of copyholds or lands of customary tenure, if the mortgage or further charge has been entered on any court rolls, the steward of the manor, or his deputy, respectively shall, on production of such receipt verified by oath of any person, make an entry opposite the entry of the charge or mortgage, to the effect that such charge or mortgage is satisfied, and shall grant a certificate either on the said mortgage or charge or separately to the like effect, which certificate shall be received in evidence in all Courts and proceedings without any further proof, and which entry shall have the effect of cleaning the register or record of such mortgage, and the registrar or recording officer shall be entitled to a fee of two shillings and sixpence for making the said entry and granting the said certificate, and such fee shall in Ireland be paid by stamps and applied as the other fees of the Registry of Deeds Office and Record of Title Office are now by law directed to be paid and applied”

Similar lan-
guage of both
statutes

The question as to the effect of a statutory receipt has frequently come before the Courts for determination. It will be observed that the language of both statutes on this point is very similar, so that it would seem that decisions on cases arising under the Act of 1836 are generally applicable to cases arising under the later Act.

Effect of
statutory
receipt as to
vesting the
property

It appears to be the settled rule that a receipt given under either of the Acts vests the legal estate in the person who in equity is best entitled to call for it, and not necessarily in the person who actually paid off the society.

Thus, where there are successive equitable mortgagees, and

the society is paid off by the mortgagor, the effect of the statutory receipt is to vest the legal estate in the equitable mortgagee who is first in point of time, unless the society is paid off by an equitable mortgagee who had no notice of prior incumbrances, in which case the legal estate vests in that mortgagee, notwithstanding that there are incumbrances prior to his in point of date (e).

In *Pease v. Jackson* (f), a legal mortgage was made to a building society constituted under the Act of 1874, and the mortgagor subsequently gave a second mortgage to the plaintiff; the defendants, at the request of the mortgagor, paid off the first mortgage; a receipt was accordingly indorsed on that mortgage, and the title deeds were handed over to the defendants, who had no notice of the plaintiff's charge, the mortgagor at the same time executed a mortgage of the property to the defendants to secure the amount paid by them to the society, together with a further advance to the mortgagor. It was held that the defendants had the better equity, and that, therefore, the rule "*qui prior est tempore potior est jure*" did not apply; and further, that on the satisfaction of the first mortgage, the legal estate vested, by virtue of the statute, either in the mortgagor, or in the persons who had the best right to call for it, in either of which cases it passed to the defendants.

In several cases (g) it was also decided that a third person paying off a building society, who obtains a receipt and the title deeds, and takes a mortgage to secure the amount so paid and a further advance to the mortgagor, is not entitled to tack the further advance. But this part of the decisions referred to has been overruled by the House of Lords in *Hosking v. Smith* (h), in which the circumstances were very similar to those in *Pease v. Jackson*. It was held that the person who paid off the society, at the request of the mortgagor, and without notice of an intermediate charge, taking a fresh mortgage for the money paid and a further advance, had priority, by virtue of the receipt on the first mortgage, over the second mortgagee, not only in

Tacking
further
advances

(e) *Pease v. Jackson*, L R 3 Ch A 576, notwithstanding *Roper v. Rice*, 28 Beav 68, and see *Stamens v. Preston*, 9 Ir Com L R 351, *Priestley v. Hopwood*, 12 W R 1031, *Re Page* (No 2), 32 Beav 485, *Mason v. Cox*, 14 Ch D 140, *Robinson v. Trevor*, 12 Q B D 423, C A

(f) L R 3 Ch A 576
(g) *Pease v. Jackson*, L R 3 Ch A 576, *Lawrence v. Clements*, 31 L T 670, *Robinson v. Trevor*, 12 Q B D 423, *Sangster v. Cochrane*, 28 Ch D 298
(h) 13 App Cas 582

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Effect of
statutory
receipt as to
vacating the
debt

respect of the money paid to the society, but also in respect of the advance made to the mortgagor

It is to be observed, however, that sect 5 of the Act of 1836 provides that the effect of the receipt shall be to vacate the "mortgage or further charge," but that by sect 42 of the Act of 1874 the effect of a receipt under that Act is to vacate the "mortgage or further charge or debt." And, accordingly, in two cases arising under the earlier Act, it was held that a covenant in a mortgage given by an advanced member to pay subscriptions until every member should have realized a specified sum per share, was not put an end to by the indorsement on the mortgage of a statutory receipt (*i*). But, in a later case, where the society was incorporated under the Act of 1874, and an advanced member had mortgaged property to secure a loan and all further payments due from him to the society, it was held by the Court of Appeal that the indorsement of a statutory receipt, though given under a mistake, put an end to the covenant in the mortgage, not only as to the principal and interest, but also as to all payments in respect of shares, and precluded the society from saying that there was any debt due from the mortgagor (*j*).

Reconveyance
by deed,

There is a further difference in the language of the two statutes in that the Act of 1836 merely authorizes the giving of a receipt, the effect of which is to vacate the charge and vest the estate in the person entitled to the equity of redemption without necessity for a reconveyance; but the Act of 1874 empowers a society to indorse on or annex to the mortgage either a reconveyance or a receipt which is to operate to vacate the charge or debt, and vest the estate "without any reconveyance or surrender." And it further provides for the entry on court rolls, and the giving of certificates of satisfaction in the case of mortgages of copyholds.

— by un-
incorporated
society,

The trustees of an unincorporated society may still reconvey mortgaged property by deed instead of giving a statutory receipt; but, if so, apparently, the reconveyance will operate under the ordinary law as would any other reconveyance, and the rights of parties will be regulated accordingly (*k*).

(*i*) *Farmer v Smith*, 4 H & N 196;
Sparrow v Farmer, 26 Beav 511

(*j*) *Harvey v Municipal Building Soc*,
26 Ch D 273.

(*k*) *Carlisle Banking Co v Thompson*,
28 Ch D 398 (a case under the
Friendly Societies Act, 1875)

So, also, if the trustees of an unincorporated society have been admitted to copyholds, it seems that a re-surrender will be necessary (*l*)

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If, however, an incorporated society executes a reconveyance instead of giving a statutory receipt, sect 42 of the Act of 1874 requires the reconveyance to be made "to the owner of the equity of redemption, or to such persons and to such uses as he shall direct," and the effect will be to vest the estate in such person or persons, and in him or them only; the statutory reconveyance and the statutory receipt are alternative modes of attaining the same object, viz, the vesting of the legal estate in the same person, that is, the owner for the time being of the equity of redemption (*m*)

— by incorporated society

If a mortgage made to the trustees of an unincorporated society which is subsequently incorporated, is paid off after incorporation, then, inasmuch as by sect. 27 of the Act of 1874 the property vested in the society on incorporation without transfer by the trustees, the indorsed receipt or reconveyance given by the society will effectually vacate the mortgage and vest the legal estate by virtue and in accordance with the statute (*n*).

— by society after incorporation

SECTION II

OF MORTGAGES TO FRIENDLY SOCIETIES.

i.—Power of Friendly Societies to lend on Mortgage—The Friendly Societies Acts of Geo IV. and Will IV. (*o*), referred to in the early part of this Chapter, were repealed by the Friendly Societies Act, 1855 (*p*); and that Act was, in its turn, repealed by the Friendly Societies Act, 1875 (*q*), whereby all the enactments then in force relating to such societies were repealed, and the law on the subject was consolidated and amended.

Repeal of former Acts

(*l*) See Barry on Building Societies, p 115

(*m*) Per Jessel, M R, in *Fourth City Mutual Benefit Building Society v Williams*, 14 Ch D 140, at p 146

(*n*) See s 27, set out *ante*, p 549,

and see *Fourth City Mutual Benefit Society v Williams*, *supra*, at p 143

(*o*) 10 Geo IV c 56, 4 & 5 Will IV c 40

(*p*) 18 & 19 Vict c 63

(*q*) 38 & 39 Vict c 60

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The Friendly
Societies Act,
1875

Vesting of
property of
society.

Devolution
on death, &c
of trustee

Admittance
to copyholds

Power of
trustees to
invest on
mortgage

Loans to
members

Loans may
be made out
of separate
loan fund.

The powers of friendly societies to lend money on mortgage is now governed by the provisions of the Act of 1875

All property of a society is vested in its trustees for the time being; and the property of a branch is vested in the trustees of that branch, or in the trustees of the society if the rules of the society so provide (*r*)

Upon the death, resignation, or removal of a trustee, the property vests in the surviving trustees either solely or together with any surviving or continuing trustees, and, until appointment of succeeding trustees, in such surviving or continuing trustees only, or in the executors or administrators of the last surviving or continuing trustee as personal estate (whether the same be real or personal) without conveyance and assignment, except as regards stock and securities in the public funds (*s*)

In legal proceedings the property is to be stated to be the property of the trustees by name as trustees for the society or branch, without further description (*t*)

Where a society is entitled in equity to any copyholds or customary lands absolutely or by way of mortgage, the lord is from time to time to admit the trustees (not to exceed three) of the society as tenants on payment of the fines and dues payable on admission of a single tenant (*u*)

The trustees, with the consent of the committee of management or of a majority of the members of a society present and entitled to vote at a general meeting, may from time to time invest the funds of such society or any part thereof to any amount (among other investments) upon any security expressly directed by the rules of the society, not being personal security, except as provided by the Act with respect to loans (*x*)

With respect to loans it is enacted (*y*) that —

“(1) Not more than one half of the amount of an assurance on the life of a member of at least one full year’s standing may be advanced to him, on the written security of himself and two satisfactory sureties for repayment, and the amount advanced, with all interest thereon, may be deducted from the sum assured, without prejudice, in the meantime, to the operation of such security

“(2) A society may, out of any separate loan fund to be formed by contributions or deposits of its members, make loans to its members on their personal security, with or without sureties, as

(*r*) 38 & 39 Vict c 60, s 16 (3)

(*s*) *Ibid.*, s 16 (4)

(*t*) *Ibid.*, s 16 (5)

(*u*) *Ibid.*, s 16 (6)

(*x*) *Ibid.*, s 16 (1)

(*y*) *Ibid.* s 18

may be provided by the rules, subject to the following restrictions —

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- (a) No loan can at any time be made out of moneys contributed for the other purposes of the society,
- (b) No member shall be capable of holding any interest in the loan fund exceeding two hundred pounds,
- (c) No society shall make any loan to a member on personal security beyond the amount fixed by the rules, or shall make any loan which, together with any moneys for the time being owing by a member to the society, shall exceed fifty pounds,
- (d) No society shall hold at any one time on deposit from its members any moneys beyond the amount fixed by the rules, which shall not exceed two thirds of the total sums for the time being owing to the society by the members who have borrowed from the loan fund”

Loans by trustees of a friendly society on personal security not authorized by the Act, though amounting to a breach of trust on the part of the trustees, so as to render them liable for any loss, are not illegal so as to preclude the trustees from recovering the money lent (z)

Loans on
unauthorized
security

Upon the death, bankruptcy, or insolvency (including liquidation by arrangement in England, *cessio bonorum* in Scotland, and petition for arrangement in Ireland) of any officer of a friendly society having in his possession by virtue of his office any money or property belonging to the society, or if any execution, attachment or other process be issued, or action or diligence raised against such officer, or against his property, his heirs, executors, or administrators, or trustee in bankruptcy, or insolvency, including an assignee in Ireland, and a judicial factor in Scotland, or the sheriff or other person executing such process, or the party using such action or diligence respectively, shall upon demand in writing of the trustees of the society or any two of them, or any person authorized by the society or by the committee of management of the same, to make such demand, pay such money, and deliver over such property to the trustees of the society in preference to any other debts or claims against the estate of such officer (a)

The institution of a suit is sufficient demand in writing, and the neglect of the trustees of the society to audit the accounts of the defaulting officer will not deprive the society of the statutory right of priority (b).

(z) *Re Coltman*, W N (1881) 136,
C A

(a) 38 & 39 Vict c 60, s 15 (7)
See *Re Atkins*, W N (1882) 38.

(b) *Absalom v Gething*, 32 Beav 322,
under the corresponding provisions of
the repealed stat 18 & 19 Vict c 63,
s 23

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An incorporated banking company cannot be an “officer” of a friendly society within the meaning of the above enactment, and an order cannot, accordingly, be made thereunder for payment to the trustees of the society of moneys in the possession of such a company as treasurer of the society (*c*)

Settlement
of disputes

Disputes between a member, or a person claiming through a member, and the society or its officers, are to be settled conclusively in manner directed by the rules of the society (*d*)

Discharge
of mortgages
by receipt
indorsed or
annexed.

ii.—**Reconveyance.**—A receipt under the hands of the trustees, countersigned by the secretary in the form in the third schedule to the Act, or in any other form specified in the society’s rules, for all moneys secured to the society by any mortgage or other assurance, such receipt being indorsed upon or annexed to the mortgage or assurance, vacates the same, and vests the property in the person entitled to the equity of redemption without reconveyance or re-surrender (*e*)

Registration,
&c of receipt

If the mortgage or assurance have been registered under any Act for the registration or record of deeds or titles, or is of copyhold or customary land and entered on any court rolls, the registrar under such Act, or steward of the manor, or keeper of the register shall, on production of such receipt, verified by oath of any person, enter satisfaction on the register or on the court rolls, respectively, of such mortgage, or of the charge made by such assurance, and shall grant a certificate either upon such mortgage or assurance, or separately, to the like effect, which certificate shall be received in evidence in all Courts and proceedings without further proof (*f*).

(*c*) *Re West of England and South Wales District Bank, Ex p Swansea Friendly Soc*, 11 Ch D 768, C A

(*d*) 38 & 39 Vict c 60, s 22 See as to the extent of this enactment, *Palliser v Dale*, (1897) 1 Q B. 257, and cases there cited

(*e*) 38 & 39 Vict c 60, s 16 (7), not applying to Scotland or Jersey

(*f*) *Ibid*, s 16 (8) A fee of two shillings and sixpence is payable for the entry and certificate by means of stamps in Scotland

Part IV.

OF VOID AND VOIDABLE SECURITIES.

CHAPTER XXXI.

OF MORTGAGES WHICH ARE VOID AS BEING IN FRAUD OF CREDITORS.

SECTION I.

OF FRAUDULENT CONVEYANCES UNDER STAT 13 ELIZ. c. 5.

i.—Avoidance of Conveyances made in Fraud of Creditors.—At common law a debtor may prefer any creditor, or any set of creditors (*a*), and that although he is insolvent (*b*), and though such preference would be void under the Bankruptcy Acts. Even a declaration of trust by the debtor of property for his creditor, though uncommunicated to him, is valid, notwithstanding the debtor knew he was insolvent (*c*). And a warrant of attorney given voluntarily, although to the prejudice of other judgment creditors, is not unlawful or fraudulent (*d*). But various enactments have from time to time been passed by the legislature for rendering void dispositions of property made with intent to defeat the claims of creditors.

Preference at
common law.

By the stat 13 Eliz c 5 (made perpetual by the stat 29 Eliz c 5), after a preamble stating the purpose of the Act to be the avoiding of feigned, covinous and fraudulent feoffments and other conveyances, “to the end, purpose and intent, to delay,

Stat 13 Eliz
c. 5.

(*a*) *Holburt v Anderson*, 5 T R 235, *Estwick v Caillaud*, 5 T R 424, *Goss v Neale*, 5 Moo 19, *Eveleigh v Purssford*, 2 Moo. & R 539, *Westbury v Clapp*, 12 W R 511

(*b*) *Nunn v Wilsmore*, 8 T R 528, *Evans v Jones*, 3 H & C 423, *Middleton v Pollock*, *Exp Elliott*, 2 Ch D 104

(*c*) *Middleton v Pollock*, *Exp Elliott*,

sup

(*d*) *Holburt v Anderson*, 5 T R 235.

cash, bank notes, and stock, and other choses in action (*h*), which may be taken in execution, fall within the Act of Eliz (*l*), as also a policy of insurance (*m*), and copyholds, which are now subject to execution (*n*)

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ii.—The Intention to Defraud Creditors.—Retention of Possession of Mortgaged Property by Mortgagor.—The question how far the retention of possession by a mortgagor of chattels raises an inference of intent to defraud creditors has been already considered (*o*)

Retention of chattels by mortgagor

It is well settled that a mortgage of lands of any tenure cannot be impeached merely on the ground of the mortgagor retaining the possession and enjoyment thereof (*p*)

Retention of possession of land by mortgagor

Some conflict of judicial opinion appears to have arisen as to whether an intent to defeat, hinder or delay creditors must be inferred as a matter of law, where it appears, as a matter of fact, that the effect or result of the assignment in question is to defeat, hinder or delay creditors; and high authority may be adduced (*q*) in support of an affirmative answer to this question; but the preponderance of authority is clearly in favour of the principle, that the language of the Act being that the conveyance of property is void as against creditors only, if it is made with intent to defeat, hinder or delay creditors, the Court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the intention of the assignor, in making the assignment, was to defeat, hinder or delay his creditors (*r*). According to this principle, the question whether or not a particular deed was executed with the intent to defeat creditors, will be a question of fact for the jury (*s*).

Whether the question of intent to defraud within the statute is one of law or of fact

Actual intention to defeat or delay creditors need not be proved if the circumstances are such that the assurance would

(*h*) See 1 & 2 Vict c 110, s 12

(*l*) *Barwick v McCulloch*, 3 K & J 110

(*m*) *Stokoe v Cowan*, 29 Beav 637

(*n*) 1 & 2 Vict c 110, s 11

(*o*) See *ante*, pp 172 *et seq*

(*p*) *Saltingstone's Case*, cit 2 Bulstr 236, *Lambert's Case*, Shep. Touchst by Preston, 267

(*q*) See cases cited *arg in Freeman v. Pope*, L R 5 Ch A 538

(*r*) *Thompson v Webster*, 4 Drew.

632, *Exp Mercer, Re Wise*, 17 Q B D 290, C A., *Godfrey v Poole*, 13 App Cas 497, at p 503 See *Le Lievre and Dennes v Gould*, (1893) 1 Q B 491, at p 500, C A

(*s*) *Henderson v Lloyd*, 3 F. & F 7, *Carr v Burdass*, 1 C M. & R 782, *Reed v Blades*, 5 Taunt 212, *London v Sharp*, 6 Man & Gr 898, *Pennell v Dawson*, 18 C B 355, *Biddulph v Gould*, 11 W R 882, *Hale v Metropolitan Saloon Omnibus Co*, 4 Drew 492.

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Transaction
must be made
in good faith

necessarily have that effect (*t*); but the mere fact that it has in the result prevented an antecedent creditor from being paid, is not of itself sufficient to invalidate the assuance (*u*)

On this statute Lord Ellenborough has remarked (*x*), that it is not every feoffment, judgment, &c, which will have the effect of delaying or hindering creditors of their debts, &c, that is, therefore, fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors. Every assignment of a man's property, however honest and good the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c, must be devised of malice, fraud, and the like, to bring it within the statute (*y*); and if the consideration is *bonâ fide*, the intent to defeat other creditors is not a fraud, independently of the Bankrupt and Insolvent Acts; as where a debtor mortgaged all his property to secure some creditors to the exclusion of the rest, the deed was held not to fall within the statute (*z*), though it contained a proviso that the debtor should remain in possession for six months (*a*).

Similarly, a sale of goods, if *bonâ fide*, is not invalidated by knowledge that an execution is intended (*b*)

Assignment
to defeat a
particular
creditor

So an assignment by an insolvent debtor of all his property for his creditors, in order to defeat a particular creditor's execution, is not within the statute (*c*), but persons claiming under a writ of sequestration issued by the Court have priority over a mortgagee who takes his security with a knowledge that it was made to avoid the effect of the sequestration (*d*)

Circumstance
from which
intent to de-
fraud may be
inferred.

The intent to defraud may be inferred from various circumstances, and it may be useful in this place to refer briefly to the cases which indicate what circumstances may be taken into consideration in determining this question so far as such cases bear upon mortgages.

(*t*) *Freeman v Pope*, L R 5 Ch A 538, 545, *Re Ridler*, 22 Ch D 74, C A

(*u*) *Freeman v Pope*, *sup*, qualifying *Sprett v Willows*, 3 De G J & S 293

(*x*) *Meux v Howell*, 4 East, 13

(*y*) See *Gale v Wilhamson*, 8 M & W 405

(*z*) *Alton v Harrison*, L R 4 Ch. A 622, *Gladstone v Padwick*, L R 6 Ex. 211, *Allen v Bonnett*, L R 5 Ch. A. 581.

(*a*) *Alton v Harrison*, *sup*

(*b*) *Hale v Metropolitan Saloon Omnibus Co*, 4 Drew 492, *Westbury v Clapp*, 12 W R 511, *Wood v Dixie*, 7 Q. B 892

(*c*) *Pickstock v Lyster*, 3 M & S 371, *Wolverhampton, &c Co v Maston*, 7 H & N 148, *Davill v Terry*, 6 H & N 807, *Manlow v Osgill*, 8 Jur N S 829

(*d*) *Ward v Booth*, L R 14 Eq 195 See *Empringham v Short*, 3 Ha. 461.

An element which may be taken into consideration as leading to an inference of fraudulent intent to defeat or delay creditors, is, if the debtor is at the time, or by such conveyance becomes, in insolvent circumstances, in which case it falls within the Act (e); but the mere owing some debts is not sufficient (f). It is not, however, necessary to prove a state of actual insolvency (g).

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What insolvency is within the statute

If, after deducting the property which is the subject of an assurance, sufficient available assets are not left for the payment of the grantor's debts, then that is an element from which the law may infer an intent to defeat creditors (h); but although a grantor is in embarrassed circumstances, yet, if the property not included in the assurance is ample to pay his debts, the assurance will be good, even if some of the debts remain unpaid (i).

The question is whether the grantor was in a position that would justify him in putting a considerable part of his property into a particular assurance (k).

So, on a conveyance of either land or goods before the insolvency of the grantor, the retention of the title deeds may be submitted to the jury as evidence of fraud (l).

Retention of deeds

If there is an actual intent to defeat creditors, it is immaterial whether the grantor was or was not solvent at the date of the settlement (m), or whether he was or was not indebted at the time; as if, being a trader, he settled all his present and future property (n); and that notwithstanding the assurance was of a very trifling amount considering the extent of his business (o).

Act may apply though grantor is solvent

A mortgage executed by the mortgagor when solvent in favour of a creditor, without his knowledge and without any communication with him, is valid (p), although the mortgagor kept it in his own possession up to the time of his death; unless

Mortgage not communicated to mortgagee

(e) *Shears v Rogers*, 3 B & Ad 362
See *Lush v Wilkinson*, 5 Ves 387,
Kidney v Cousmaker, 12 Ves 148,
Norcutt v Dodd, Cr & Ph 100

(f) *Sharf v Souby*, 1 Mac & G 364

(g) *Townsend v Westcott*, 2 Beav 340

(h) *Freeman v Pope*, L. R. 5 Ch. A. 538, 545, *Taylor v Coenen*, 1 Ch. D. 641, *Spurrett v Willows*, 3 De G. J. & S. 293, *Jackson v Bowley*, 1 Car. & M. 97 And see *Re v. Sadlers' Co*, 10 H. L. C. 404

(i) *Kent v Ryley*, L. R. 14 Eq. 190
See *Holcroft's Case*, Dy. 294 b, *Stephens*

v Olve, 2 Bro. C. C. 90, *Battersbee v Farrington*, 1 Swanst. 106, *Russell v Hammond*, 1 Atk. 15, *Middlecombe v Marlow*, 2 Atk. 220, *Lord Townsend v Windham*, 2 Ves. Sen. 1

(k) *Crossley v Elworthy*, L. R. 12 Eq. 158

(l) *Doe v Ball*, 11 M. & W. 531.

(m) *Spurrett v Willows*, 3 De G. J. & S. 293

(n) *Id.*, *Wars v Gardner*, L. R. 7 Eq. 317, *Taylor v Coenen*, 1 Ch. D. 641

(o) *Taylor v. Coenen*, *sup*

(p) 1 *Shep Touchet* by Preston, 57, 4 *Cru Dig* 29, ed. 4.

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it was delivered as an escrow, or fraud is proved (g) So a delivery of the mortgage deed by the mortgagor to his own solicitor, who retained it till the mortgagor's bankruptcy, was held a valid delivery to the mortgagees (i)

But a voluntary mortgage, not communicated to the creditor, and kept to be made use of if convenient, was held fraudulent under the statute 27 Eliz. c. 4 (s)

How far cases referred to relating to settlements bear on mortgages.

The cases referred to in this section are, for the most part, cases in which questions have arisen as to setting aside voluntary settlements for want of consideration and other circumstances indicating an intent to defraud creditors within the meaning of the statute, but the principles underlying the decisions seem to apply to cases of mortgages

It must, however, be borne in mind that, in the case of a mortgage, an equity of redemption of more or less value is left in the mortgagor and is available after payment of what is due to the mortgagee for principal, interest, and costs, for the purpose of satisfying the claims of creditors

Assignment by debtor in *extremis*

Where an insolvent debtor, shortly before his death, purported to assign absolutely certain policies of insurance on his own life of considerable amount to a particular creditor in consideration of the release of a debt due to him, the assignment, though held to be voluntary and void under the statute as an absolute assignment, was ordered to stand as a security for the debt due at the time of the assignment (t)

Adequacy of consideration

The adequacy of consideration is another important, though not conclusive, element in determining the *bona fides* of a transaction (u) It has been held that a past debt is an adequate consideration for a mortgage within the statute (x); *a fortiori*, if the consideration is not only an antecedent debt, but also a substantial advance made at the time when the mortgage is given (y) And a bill of sale to secure an existing debt and future advances will not be void under the statute if made in good faith (z).

(g) *Doe v Knight*, 5 B & Cr 671, 226
Eaton v Scott, 6 Sim 31 See *Dillon*
v Coppin, 4 My & Cr 682
 (i) *Grugson v Gerard*, 4 Y & C
 Ex 119
 (s) *Cracknell v Janson*, 11 Ch D 1,
 C A See *Perry-Herrick v Attwood*,
 2 De G & J 21, see also *Wilson v*
Balfour, 2 Camp 579, *Exp Combe*, 9
 Ves 117, *Adams v. Claxton*, 6 Ves.

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(t) *Stokoe v Cowan*, 29 Beav 637.
 (u) See *Doe v James*, 16 East, 212
 (x) *Edwards v Harbin*, 2 T R 587,
 1 R R 548
 (y) *Masindale v Booth*, 3 B & Ad
 498, *Riches v Evans*, 9 C & P 640
 (z) *Exp Games, Re Bamford*, 12 Ch
 D 314, C A

But, though a mortgage is given in consideration of a sum actually advanced, the deed will be liable to be set aside if, by its form or effect, it shows that its intention is to protect the goods from claims of other creditors and retain the benefit and enjoyment of them to the grantor (a)

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It makes no difference whether the deed deals with the whole or only a part of the grantor's property, or even if it extends to after-acquired property; if the deed is *bonâ fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth (b).

But a deed, though made for valuable and adequate consideration, may yet be void under the statute if an actual and express intent to defeat creditors is proved (c)

Consideration
not sufficient
if fraud exists

The statute also avoids mortgages of interests derived under settlements or other instruments which are themselves fraudulent and void under the statute, as against the creditors of the settlor or grantor. As regards voluntary settlements, it was said by Taunton, J, in *Shears v Rogers* "It is established by a long train of decisions that a voluntary assignment made without valuable consideration, so as to defeat the rights of creditors, is fraudulent within the meaning of the statute" (d). And, of course, if the settlement or other conveyance under which the mortgagee claims is void, his security will be void also. But the question as to the avoidance of voluntary settlements, &c, is one of the mortgagor's title, and beyond the scope of the present treatise.

Voluntary
settlements

The effect of sect 5 of the statute is to except from the operation of the Act in favour of a purchaser for value without notice, any interest, whether legal or equitable, derived under a settlement, which that statute would make void against creditors, as to other persons claiming under it. So, where by a settlement, which was fraudulent against creditors under the statute, a reversionary life interest was reserved to the settlor, who charged such interest by way of equitable mortgage to a person

(a) *Reed v Blades*, 5 Taunt 212, *Latimer v Batson*, 4 B & C 652, *Graham v Furber*, 14 C B 410, *Hale v Metropolitan Saloon Omnibus Co*, 4 Drew 492, *Bott v Smith*, 21 Beav 511

(b) *Alton v Harrison*, L R 4 Ch. A 622, *Exp Games, Re Bamford*, 12 Ch D 314, C A

(c) *Per Lord Mansfield in Cadogan v Kennett*, Cowp 432, *Strong v Strong*, 18 Beav 408, *Holmes v Penney*, 3 K & J 90, *Bott v Smith*, 21 Beav 511, affirmed, p 517, *Corlett v Radcliffe*, 14 Moo P C 121, *Cornish v Clark*, L R 14 Eq 184, *Three Towns Banking Co v Maddaver*, W N (1893) 104

(d) 3 B & Ad 370

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who advanced his money without notice that the settlement was fraudulent, it was held that the mortgage was protected by sect. 5, and was accordingly good as against the creditors of the settlor (*e*).

Validity of
fraudulent
conveyances
as against
assignor

iii.—Against what Creditors a Fraudulent Conveyance will be Avoided—The statute renders void conveyances made with intent to defraud creditors only as against persons whose actions, &c, may be defrauded or hindered, and the representatives of such persons. An assurance, though fraudulent under the statute, will therefore be valid as against the assignor himself, and as against strangers other than creditors; it will also be valid as against creditors who are cognisant of and take part in the arrangement under which the assignment is made (*f*).

Subsequent
creditors

It has been held at law that an assurance cannot be void against a person who only became a creditor after its date (*g*). But in equity an assurance is void if made with a view to defeat future debts (*h*); and when an assurance is once avoided under this statute, subsequent creditors may be let in together with antecedent creditors (*i*); and a subsequent creditor may himself bring an action to avoid the assurance, if any antecedent debt remains due (*k*). An assurance may be made under such circumstances as to be void against subsequent creditors, although all the antecedent creditors are paid off (*l*), as where it is made to defeat a plaintiff in an action (*m*); or where the grantor immediately afterwards realizes all the rest of his property and denudes himself of everything (*n*); or where he makes the assurance on the eve of entering into an hazardous trade, in

(*e*) *Halifax Joint Stock Banking Co v. Gledhill*, (1891) 1 Ch 31

(*f*) *Steel v Brown*, 1 Taunt 381, *Robinson v McDonnell*, 2 B & Ald 134, *Bessey v Windham*, 6 Q B 166, *White v Morris*, 11 C B 1015, *Oliver v King*, 8 De G M & G 110

(*g*) *Oswald v Thompson*, 2 Exch 215. But see *Graham v Furber*, 14 C B 410, per Williams, J

(*h*) *Stileman v Ashdown*, 2 Atk 481, *Tarbaok v Marbury*, 2 Vern 510, *St Amand v Lady Jersey*, 1 Comyns, 255, *Hungerford v Earle*, 2 Vern 261, *Ware v Gardner*, L R 7 Eq. 317

(*i*) *Barton v Vanheythusen*, 11 Ha 126, 133, *Strong v Strong*, 18 Beav 408

(*k*) *Jenkyn v Vaughan*, 3 Drew 419, *Freeman v Pope*, L R 5 Ch A 645, *Crossley v Elworthy*, L R 12 Eq 167

(*l*) *Richardson v Smallwood*, Jac. 552, *Holmes v Penney*, 3 K & J 90, 99

(*m*) *Barling v Bishop*, 29 Beav. 417, *Kidney v Coussmaker*, 12 Ves 148.

(*n*) *Sprett v Willows*, 3 De G J & S 293, 302, *Freeman v Pope*, L R 5 Ch. A 538

which case the onus would fall on him to show that he was in a position to make it (o) CHAP XXXI

A creditor under a voluntary *post obit* bond is as much entitled to the benefit of this statute as any other creditor (p)

It is not necessary for a creditor to have a lien or charge on the property the subject of the settlement to entitle him to a decree to set it aside (q). Where the settlor has subsequently mortgaged all his personal estate, the chattels which are the subject of the fraudulent settlement do not, upon its being declared void, vest in the mortgagee (r). He has only the right of a general creditor, and must take independent proceedings to have execution of the property (s)

The statute applies where the debts were contracted not by the party making the conveyance, but by the ancestor from whom he derived the estate (t), and a fraudulent conveyance may be made by an executor as well as by an heir (u) Debt of ancestor or testator

An action by a creditor to set aside a settlement under this statute is not affected by the insolvency of the settlor subsequent to the commencement of the action (x). If the settlor has become bankrupt, the trustees in bankruptcy are the proper persons to bring the action (y). The trustees in bankruptcy are "parties grieved" within the statute (z). Action to set aside conveyance

Any particular creditor, including a mortgagee, whether legal or equitable, may take proceedings to set aside a voluntary settlement (a); but it does not appear to be free from doubt whether a creditor, even if he is a mortgagee, can after the bankruptcy of the debtor maintain an action to set aside a conveyance made by the debtor prior to the bankruptcy, on the ground that such conveyance is fraudulent within the statute, or whether the right of such action in such a case is in the trustee in the bankruptcy only (b) Who may bring action

(o) *Machay v Douglas*, 14 Eq 106, *Esq Russell*, 19 Ch D 583, G A

(p) *Adames v Hallett*, L R 6 Eq 468, *Deming v Ware*, 22 Beav 184

(q) *Reese River Silver Mining Co v Atwell*, 7 Eq 347, *Goldsmith v Russell*, 5 De G M & G 547. But see *Lister v Turner*, 5 Ha 281, *Collins v Burton*, 4 De G & J 612

(r) *Barton v Vanheythusen*, 11 Ha 126

(s) *Reese River Silver Mining Co v Atwell*, *sup*, *Lister v Turner*, *sup*

(t) *Aphairy v Bodingham*, Cro Eliz 350, *Gooch's Case*, 5 Rep 60. See *Richardson v Horton*, 7 Beav 112

(u) *Doe v Fallows*, 2 Cr. & J 481, 2 Tyrw 460

(x) *Goldsmith v Russell*, 5 De G. M & G 547

(y) *Collins v Burton*, 4 De G & J 612, *Goldsmith v Russell*, *sup*

(z) *Butcher v Harrison*, 4 B & Ad. 129, *Doe v Ball*, 11 M & W 531

(a) *Ede v Knowles*, 2 Y & C C C. 172

(b) *Lister v Turner*, 5 Ha 281.

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Form of
decree.

The form of the decree is that the deed be declared void against the creditors, and that the defendants join in all necessary acts for raising the money for the creditors (*c*), and the decree must be on behalf of all the creditors (*d*)

Costs

In one case (*e*) Lord Cranworth gave the trustees and infant *cestus que trust* their costs; but this case has not been followed, and the utmost that can be done is to make the decree without costs (*f*), and if they appeal and fail they will be fixed with costs (*g*).



SECTION II

OF THE AVOIDANCE OF MORTGAGES IN BANKRUPTCY

Fraudulent
conveyances
are acts of
bankruptcy

i.—Introductory Remarks.—A conveyance by way of mortgage which is “fraudulent” within the meaning of the statute 13 Eliz c 5, is also void under the Bankruptcy Act, 1883 (*h*), and such conveyance will be liable to be set aside accordingly in favour of the general creditors of the mortgagor if any proceedings in bankruptcy should be founded upon such act or any other act of bankruptcy committed either before or after the conveyance within the limit of time to be presently stated. But a conveyance may be good as against an execution creditor under the statute of Elizabeth, but may, nevertheless, be bad as against the trustee in bankruptcy of the mortgagor

Conveyance
unimpeach-
able in bank-
ruptcy after
three months.

If a deed executed by a debtor is liable to be set aside on the ground that it is within the mischief of the bankrupt law, it will apparently become valid and unimpeachable as against the trustee in bankruptcy after the lapse of three months from its execution, if during that period no proceedings in bankruptcy are taken against the debtor (*i*), independently of the question whether or not it may be void as against an execution creditor

(*c*) *Bott v Smith*, 21 Beav 511, affirmed, L J p 517 See *Davill v Terry*, 6 H & N 807

(*d*) *Strong v Strong*, 18 Beav 408, *Reese River, &c Co v Atwell*, L R 7 Eq 347

(*e*) *Goldsmith v Russell*, 5 De G M & G 547

(*f*) *Elsay v Cox*, 26 Beav 95

(*g*) *Exp Russell*, 19 Ch D 588, C A

(*h*) 46 & 47 Vict c 52

(*i*) *Ibid* ss 6, 48 The period was formerly twelve months prior to adjudication See *Allen v Bonnett*, L R 5 Ch App 577 See also *Mercer v Peterson*, L R 2 Ex 304, *S C*, 3 *ibid* 104, *Jones v Harber*, L R 6 Q. B 77.

under the statute of Elizabeth, or generally as fraudulent against creditors

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It has been seen that a conveyance by way of mortgage of a person's whole property, or of the whole with a merely colourable exception, and *a fortiori* such a conveyance of part only of his property to secure an existing debt, is not necessarily void under the statute of Elizabeth (*j*), but any such conveyance, if "fraudulent," or amounting to "fraudulent preference" within the meaning of the bankruptcy law, is an act of bankruptcy and liable to be avoided accordingly

Mortgage of debtor's whole property

ii.—Fraudulent Conveyances are Acts of Bankruptcy.—The enactments governing the question how far mortgage securities given by a debtor are voidable in the event of the subsequent bankruptcy of the mortgagor by his trustee, are the following sections or parts of sections of the Bankruptcy Act, 1883 (*k*)

Bankruptcy Act, 1883.

Section 4 "A debtor commits an act of bankruptcy in each of the following cases —

Acts of bankruptcy.

- (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally,
- (b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof,
- (c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt"

Section 6 "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless

Conditions on which creditor may petition

- (b) The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition"

Section 43 "The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition, but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor"

Relation back of trustee's title

(j) See *ante*, p 573.

(k) 46 & 47 Vict c 52

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Conveyance
not avoided
unless frau-
dulent by
English law

It will be observed that sect 4 renders void the conveyances and assignments specified in clauses (a), (b), and (c) if made by a debtor "in England or elsewhere" Such instruments will, therefore, amount to acts of bankruptcy if made anywhere abroad by a person subject to English law (*l*). But a conveyance of property situate abroad out of the jurisdiction of the English Courts cannot defeat or delay creditors so as to constitute an act of bankruptcy; and a conveyance of property in England by a domiciled foreigner in his own country which can operate only according to the law of that country, is not within the section "The section clearly means, and has always been interpreted as meaning, fraudulent by the law of England, and, therefore, cannot properly apply to a conveyance which is executed in and is to operate according to the law of a foreign country" (*m*).

Fraudulent
conveyance
is an act of
bankruptcy,
and void

Sect 4, though it makes "fraudulent conveyances" available acts of bankruptcy, does not, nor does any other section of the Act, expressly render such conveyances void as against the trustee, as is the case with regard to conveyances amounting to "fraudulent preferences" within the meaning of sect. 48 But the result of the decisions is such as to make it clear that, if a conveyance by a debtor is a "fraudulent conveyance" so as to constitute an act of bankruptcy, it will be invalid as against the trustee, unless saved by lapse of time (*n*).

Fraudulent
conveyance
not avoided
if made three
months before
petition

Further, the Act nowhere expressly says that a "fraudulent conveyance," to be impeachable as being an act of bankruptcy, must have been made within three months before presentation of a petition on which the debtor is adjudicated bankrupt, as is provided by sect 48 with regard to "fraudulent preferences" But, having regard to the language of sects 6, 43, as to the time after an act of bankruptcy within which a petition may be presented, and as to the relation back of the trustee's title to such act, it seems a necessary inference that a conveyance made before the commission of such act will be unimpeachable as against the trustee; and the question has been so determined by judicial decision. So, where a debtor assigned all his estate and effects by way of security for a sum then due, and a small

(*l*) *Exp Blam, Re Sowers*, 12 Ch D at p 532

(*m*) *Exp Crispin*, L R 8 Ch A 374 See *Exp Defries, Re Myers*, 35 L T 392

(*n*) *Rust v. Cooper*, Cowp. 632,

Alderson v Temple, 4 Burr 2239, *Woodhouse v Murray*, L R 2 Q B 638, *Re Colemece*, L R 1 Ch A 128, at p 134, *Re Nurse, Exp Foxley*, L R 3 Ch A 515, 519, *Re Wood*, L R 7 Ch A. 302.

further advance, and became bankrupt seventeen months afterwards, it was held, independently of the question as to whether the assignment was saved by the present advance (o), that the lapse of time which had occurred since the assignment rendered the deed valid as against the trustee in bankruptcy, though it might otherwise have been impeachable by him (p). So a bill of sale was upheld, though a liquidation supervened within the statutory period, where such bill was given in substitution for a previous bill of sale (q).

In the Bankruptcy Acts prior to 1869, a conveyance must, so as to be available as an act of bankruptcy, and impeachable accordingly, have been made by a debtor fraudulently "with intent to defeat or delay his creditors", but in the Act of that year these words were omitted from the definition of a "fraudulent conveyance," and the omission has been continued in the present Act. The effect of the omission, however, has not been to change the rule formerly prevailing in bankruptcy, that the question whether a conveyance was fraudulent against creditors was one of law, not of fact; the words were omitted as superfluous and misleading, inasmuch as the Court or a jury were by that rule sometimes compelled to find fraudulent intent, where, in fact, there was no such intent (r).

Question whether conveyance is fraudulent in bankruptcy is one of law

In determining the conclusion of law whether a mortgage security given by a person who afterwards becomes bankrupt is impeachable as a "fraudulent conveyance," the facts of the particular case must be examined. "In each case, looking at all the circumstances, you have to answer these questions. Does the assignment include all the property, or is there a substantial exception? Is it wholly to secure a pre-existing debt? And, if there is a further advance, is it a substantial one, or only one intended to give colour to a security which is in reality made only for the purpose of securing a pre-existing debt? These are questions of fact, and the answers to be given depend on the circumstances" (s).

Circumstances of particular case must be considered

A mortgage of the whole of the debtor's property, or of

Mortgage of whole of

(o) See as to this, *infra*

(p) *Allen v Bonnett*, L R 5 Ch A

577 See also *Meier v Peterson*, L R

2 Ex 304, *Jones v Hanber*, L R 6

Q B 77

(q) *Lomaz v Burton*, L R 6 C P

107

(r) *Re Wood*, L R 7 Ch A 302, at p 307

(s) *Exp King, Re King*, 2 Ch D 256, at p 262 See *Admors - Gen of Jamaica v Lascelles*, (1894) A C 135, at p 139

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debtor's pro-
perty to secure
existing debt
is void

Motives of
parties
immaterial

Notice of
act of bank-
ruptcy

Consideration
of forbear-
ance.

Indemnity
to surety

Mortgage
of part of
property for
subsisting
debt valid.

the whole with a colourable exception, whether for the benefit of a particular creditor or creditors to the exclusion of others (*t*), or for the benefit of his creditors generally (*u*) to secure an existing debt or debts, is an act of bankruptcy, and void accordingly as against the trustee

Such a mortgage in favour of a particular creditor or several creditors is void, though no fraudulent motive on the part of any of the parties is proved, as the fraudulent intent will be imputed to the mortgagee from the necessary and obvious result of the transaction being to defeat or delay other creditors (*x*); and it makes no difference in this respect whether the mortgagor is a trader or non-trader (*y*)

The knowledge by the creditor that the assignment comprises all the debtor's property affects him with notice of the act of bankruptcy, though the assignment do not purport to convey all his effects (*z*).

A mortgage of substantially the whole of a debtor's property to secure an existing debt will not be saved by reason of its being given in consideration of forbearance to seize under an execution or under a previous bill of sale (*a*)

An assignment of a man's whole property is also void if by way of indemnity or as a surety, where the debtor's estate gets no equivalent (*b*); but the giving of further time to the debtor may be a sufficient fresh consideration to render the conveyance valid (*c*)

A *bond fide* mortgage by a debtor of part only of his property, given to secure a subsisting debt, is *prima facie* not a fraudulent

(*t*) *Re Wood*, L R 7 Ch A 302, *Exp Trevor*, 1 Ch D 297. See also *Seabert v Spooner*, 1 M & W 718, *Exp Bland*, 6 De G M & G 761, *Smith v Timms*, 1 H & C 849, *Lacon v Liffen*, 32 L J Ch 315, *Exp Clater*, *Re Wilkinson*, 48 L T 648, *Woodhouse v Murray*, L R 4 Q B 27, *Re Nurse*, *Exp Fozley*, L R 3 Ch A 515

(*u*) Bankruptcy Act, 1883, s 4 (*a*), *ante*, p 577. See *Re Wood*, *sup*

(*x*) *Exp Ellis*, 2 Ch D 797, C A. See *Young v Fletcher*, 3 H & C 732, *post*, p 582 (which was a case of a mortgage of part only of the debtor's property to secure an existing debt, but it appeared that the mortgagee was aware that the result would be to delay creditors)

(*y*) *Re Wood*, L R 7 Ch A 302. See *Exp Luckes*, 26 L T N S 113, L JJ, *Exp Hawker*, L R 7 Ch. A 214

(*z*) *London v Sharp*, 6 Man & Gr. 895, *Exp Bland*, 6 De G M & G 761, *Exp Levers*, 31 L J Bky 11, *The Oriental Bk Co v. Coleman*, 3 Griff 11, *Graham v Chapman*, 12 C B 85

(*a*) *Woodhouse v Murray*, L R 4 Q B 27, *Exp Cooper*, *Re Baum*, 10 Ch D 313, *Exp Payne*, *Re Cross*, 11 Ch D 539

(*b*) *Leake v Young*, 5 E & B 955, *Goodricke v Taylor*, 2 De G J & S 135, *Woodhouse v. Murray*, L. R. 2 Q B 27

(*c*) *Phelps v Hornstedt*, 1 Ex D 62, C A, *Exp Sheen*, 1 Ch D 561.

conveyance liable to be set aside in the event of the mortgagor's subsequent bankruptcy (*d*)

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But the mere fact that the property included in a mortgage is only a part, and not the whole with a merely colourable exception, of the mortgagor's property, will not be conclusive as to the *bona fides* of the transaction. The difference in this respect between a mortgage of substantially the whole of a debtor's property and a mortgage of a portion of the property, appears to be that in the former case the burden of proving *bona fides* lies on the debtor, in the latter case the burden is shifted to the bankruptcy trustee (*e*).

Exception when mortgage made in fraud of creditors

In order to impugn a mortgage of a part only of a debtor's property, it would seem that it must be shown that a deed is fraudulent and void under some other statute, as, *e g*, the statute 13 Eliz c 5, or as a fraudulent preference under the bankruptcy law, or by reason of circumstances attending the transaction, leading the Court or a jury to find, as a fact, that the intent and object of the deed was to defeat or delay creditors (*f*).

Mortgages of part only, not being substantially the whole, of a debtor's property, if liable to be set aside as fraudulent conveyances, will for the most part, but not invariably, be found to be also void as fraudulent preferences within sect. 48 of the Bankruptcy Act, 1883

So a mortgage by a trader of less than a moiety of the whole of his property was upheld, no actual fraud being proved, although the effect of enforcing the security would have been to stop his business (*g*)

In a later case, where the proportions of the property included in and excepted from the mortgage were similar, a contrary decision was made, but in that case the greater part of the excepted property consisted of the equity of redemption in the property mortgaged, which was not legally available for the

(*d*) *Carr v Burdiss*, 1 C M & R 443

(*e*) *Abbott v Burbage*, 2 Bing N C 444 See and compare *Young v Waud*, 8 Exch 221, and *Young v Fletcher*, 3 H & C 732, *infra* See also *Smith v Cannan*, 2 E & B 35, *Grogan v Cooke*, 2 Br & B. 230, *Harris v. Wanklin*, 5 W R 51, *Smith v. Timms*, 1 H & C 849,

Pennell v Dawson, 18 C B 363, *Pennell v Reynolds*, 11 C B N S 709

(*f*) *Hassells v Simpson*, 1 Doug 88, n See *Spurrett v Willows*, 3 De G J. & S 293, *Exp Mayon*, 13 W R 629, *Exp Wensley*, 1 De G J & S 273

(*g*) *Young v. Waud*, 8 Exch 221.

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Effect of
pressure by
creditor

other creditors, and the remainder was of merely nominal value; moreover, it appeared that the mortgagee was well aware that the necessary result of enforcing the security would be to stop the business and so delay the creditors (*h*)

Pressure by a creditor may be material as tending to show that the debtor's intention in mortgaging part of his property was to escape from the pressure and not to defraud his creditors (*i*) But no amount of pressure will save the deed if fraudulent intent is proved in the case of a partial disposition (*l*)

The same rule will apply with greater force where the disposition includes substantially the whole of the debtor's property So where a trader under pressure, on the part of certain creditors, mortgaged substantially the whole of his property to secure debts owing to them, and it appeared that the effect of the mortgage would be to stop his trade, it was held that the mortgage was void as against the assignees in the debtor's bankruptcy as a fraudulent conveyance, inasmuch as the intention to defeat or delay the creditors must be imputed to the bankrupt, although the deed must be taken to have been the unwilling act of the bankrupt executed under pressure, so as to prevent it from being a fraudulent preference (*l*)

If the security is obtained by pressure, it will not, in the absence of collusion (*m*), be a fraudulent preference, although the creditor was aware of the insolvency of the debtor (*n*); although a transaction, under which a power of sale is given to a creditor practically over all the debtor's property, may be within the Bankruptcy Act, 1883, s 4 (*o*), yet, where the trader receives a fair equivalent, the transaction is not void under the bankrupt law, though the trader assigns his whole property (*p*)

Colourable
exceptions

It is well settled that merely colourable exceptions of part of a debtor's property will not render valid an assignment of what is substantially the whole of his property (*q*).

(*h*) *Young v Fletcher*, 3 H & C 732

(*i*) *Smith v Timms*, 1 H & C 849

(*k*) *Young v Fletcher*, *sup*, *Exp Wensley*, 1 De G J & S 273, *Goodwin v Taylor*, 2 De G J & S 135

(*l*) *Exp Bailey*, *Re Barrett*, 3 De G M & G 534 See *Exp Reader*, *Re Wragley*, L R 20 Eq 763, *Tomkins v Saffery*, 3 App Cas 213

(*m*) *Belcher v Jones*, 2 M & W 258

(*n*) *Smith v Pilgrum*, 2 Ch D 127, C A, *Exp Hall*, *Re Cooper*, 19 Ch D 580, C A

(*o*) *Phelps v Hornstedt*, 1 Ex. D 62, C A See *Exp Norton*, L R 16 Eq 397

(*p*) *Ibid*, *Mercer v Peterson*, L R 2 Ex 304, S C, L R 3 Ex 104 And see *Exp Cooper*, *In re Baum*, 10 Ch D 313, C A

(*q*) *Worsley v De Mattos*, 1 Burr.

The general test as to whether an exception is colourable or not appears to be whether or not the exception will save the assignment, if enforced, from causing an immediate insolvency. In the case of a trader it will generally be inferred that the result of an assignment will be to produce insolvency if the result actually is to stop his business (*r*). In the case of a non-trader, this test is, of course, not applicable, and the general test must be applied having regard to the circumstances of each particular case.

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Test is, whether exception is sufficient to save insolvency

The exception will not be sufficient to save an assignment if the excepted part of the property is such as would not pass to the trustee nor be capable of being taken in execution (*s*). So the exception of a pension which would not pass to an assignee is not substantial (*t*); nor is the exception of tenant right under a lease, which is a mere contingent right (*u*). In estimating whether a bill of sale comprises the whole of a debtor's property, the value of his book debts is to be taken into account (*x*). It is sufficient if the debtor is left in possession of sufficient materials to carry on his trade (*y*). If the mortgage passes all the stock in trade, so that he cannot carry on his business, it is held void, although he has other property besides his stock in trade (*z*).

What are sufficient exceptions

But though the effect of a mortgage of the whole, or of substantially the whole, of a debtor's property is not to produce insolvency in the mortgagor, it may be liable to be set aside in bankruptcy if its result is to defeat or delay the creditors of the mortgagor. So, the fact that the amount secured is much less in amount than the value of the property assigned will not save the security, unless saved by sect. 49 from being void as a fraudulent conveyance, inasmuch as the vesting of the legal estate in the mortgagee prevents the equity of redemption from being seized in execution, and thus takes the whole of the

Mortgage void if it withdraws all debtor's property from legal remedies of creditors

467, *Hale v Allnutt*, 25 L J C P
267, *Smith v Timms*, 1 H & C
849, *Pennell v Dawson*, 18 C B 355,
Pennell v Reynolds, 11 C B N S
716
(*r*) *Young v Ward*, 8 Ex Ch 234,
Leake v Young, 5 E & B 255, *Young*
v Fletcher, 3 H & C 732, *Exp Bland*,
6 De G M & G 757, *Smith v*
Cannan, 2 E & B 35, *Exp Clater*, *Re*
Wilkinson, 48 L T 648
(*s*) See *Re Cockshott*, 3 Bro C C

502
(*t*) *Exp Hawker, Re Keely*, L R
7 Ch A 214
(*u*) *Exp Dann*, 17 Ch D 26, C A
(*x*) *Exp Dollard*, 41 L J Bky 60,
Exp Burton, 13 Ch D 102, C A
(*y*) *Johnson v Fesemeyer*, 3 De G &
J 13, *Goodricks v Taylor*, 2 De G
J & S 135, *Smith v Cannan*, 2 E &
B 35
(*z*) *Young v Fletcher*, 3 H & C
732.

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debtor's property out of the reach of the common law remedy of the creditors (*a*).

Mortgage by partner of all his separate property

It was held in one case that an assignment by a partner in an insolvent firm of all his separate property was a fraudulent conveyance, though the assignment did not include the partnership assets, which were, of course, seizable in execution on a judgment against the partner (*b*); and conversely, a mortgage by a partner in an insolvent firm of the partnership property as a security for his separate debt is void, as fraudulent as against the creditors of the partnership (*c*).

An assignment of what was, in fact, the whole of a trader's property, was held to be a fraudulent conveyance, though he was not aware that he was assigning all his property, but intended to except his furniture and stock in trade, which had been taken in execution without his knowledge (*d*).

Bankruptcy Act, 1883, s 4

iii.—Fraudulent Preference—The avoidance of conveyances on the ground of fraudulent or voluntary preference is now regulated by the Bankruptcy Act, 1883, s 4, sub-s (c), and s 48 (*e*).

Principle of the doctrine of fraudulent preference

The doctrine of fraudulent preference has been established for the benefit of creditors generally, and not for the benefit of any individual creditor. And accordingly, where the result of recovering property alleged to have been delivered or transferred would be to benefit not the creditors generally, but a particular creditor who claims a security on the property, the trustee ought not himself to take proceedings or allow proceedings to be taken in his name for the recovery of the property on the ground of fraudulent preference (*f*).

Statutory recognition of the doctrine

The former Bankruptcy Acts, prior to that of 1869 (*g*), did not contain any express mention of "fraudulent preference," though the term was frequently used in bankruptcy proceedings to signify voluntary assignments made by persons in insolvent circumstances, or in contemplation of insolvency or bankruptcy for the benefit of any creditor in particular or creditors

(*a*) *Smith v Cannan*, 2 E & B 35, *Re Wood*, L. R. 7 Ch. A. 302.

(*b*) *Exp Trevor, Re Burghardt*, 1 Ch D 297.

(*c*) *Exp Snowball, Re Douglas*, L. R. 7 Ch. A. 534.

(*d*) *Exp Barley*, 3 De G. M. & G

534. See *Exp Richardson*, 14 Ves 186, *Wedge v Newlin*, 4 B & Ad 831, *Exp Sparrow*, 2 De G. M. & G 907.

(*e*) See sect 4 set out *ante*, p 577.

(*f*) *Exp Cooper, Re Zuoco*, L. R. 10 Ch. A. 510.

(*g*) 32 & 33 Vict c 71.

generally. The term "fraudulent preference" was first defined by the Act of 1869 in language similar to that of the present Act, except so far as will be presently pointed out

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The Bankruptcy Act, 1883 (*h*), enacts as follows —

Sect 48 "(1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered (2) by any person unable to pay his debts as they become due from his own money, in favour of any creditor or any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy

Avoidance of preferences in certain cases

"(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt"

Sect 49 "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of bankruptcy—

Protection of *bona fide* transactions for value without notice

(c) Any conveyance or assignment by the bankrupt for valuable consideration,

(d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration. Provided that both the following conditions are complied with, namely—

(1) The payment, delivery, conveyance, assignment, contract, dealing or transaction, as the case may be, takes place before the date of the receiving order, and

(2) The person (other than the debtor) to, by or with whom the payment, delivery, conveyance, assignment, contract, dealing or transaction was made, executed, or entered into, has not, at the time of the payment, delivery, conveyance, assignment, contract, delivery or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time"

Having regard to the definition introduced by the Act of 1869, and repeated with modifications by the Act of 1883, the decisions under the earlier Bankruptcy Acts must be consulted with some caution (*j*). Such decisions may serve as a guide, but must not be substituted for the words of the Act (*k*).

How far earlier decisions apply

The following decisions were made under the old Acts. An assignment or payment by an insolvent was not voluntary, if

Voluntary assignments by insolvents under the old law.

(*h*) 46 & 47 Vict c 52

(*i*) See *Exp Lancaster*, 25 Ch D 311, C A.

(*j*) *Per* Lord Cairns, C, in *Butcher v Stead*, L R 7 H L 839, at p 846.

(*k*) *Exp. Griffith, Re Wilcoxon*, 23 Ch. D, 69, C. A.,

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made for a *bonâ fide* consideration (*l*) ; or under pressure on the part of the creditor (*m*) ; or even without pressure or threat, if there were a *bonâ fide* demand on the part of the creditor (*n*) ; if, in fact, anything were done by the creditor to interfere with or control the debtor's will (*o*) ; and the circumstance of the grantor being the grantee's solicitor made no difference in this respect (*p*) . Though the debtor may have desired to favour the creditor, yet if there was a *bonâ fide* application, and the act in any degree proceeded from such application, it was not entirely voluntary, and therefore not fraudulent (*q*) . There must not have been any collusion . as if the creditor acted on a hint from his debtor as to his circumstances (*r*) . *Secus*, if the creditor derived his information from a third person (*s*) .

The security was protected, though the debt was not actually payable (*t*) ; but the demand must have been made by someone entitled to make it (*u*), as by a guarantor (*x*), and the transaction must have been in the usual course of business (*y*) ; but knowledge by the creditor of the insolvent state of the debtor's affairs was held to be immaterial where the question was merely as to the voluntary character of the act (*z*) . Where the security contained provisions for the benefit of third persons, the demand did not deprive those provisions of their voluntary character (*a*) ; nor had the holder of a collateral security the benefit of the demand (*b*) . So a transfer of a *part* of a trader's goods in satisfaction of a *pre-existing debt*, if made voluntarily and in contemplation of bankruptcy, was held void as against the assignees under a subsequent adjudication (*c*)

The question

The question of fraudulent preference depended upon the

(*l*) *Arnell v Bean*, 8 Bing. 87 See
Exp Cox, Re Reed, 1 Ch D 302

(*m*) *Davies v Acocks*, 2 C M & R
461, *Knight v Ferguson*, 5 M & W
389.

(*n*) *Mogg v Baker*, 4 M & W 348,
Reynard v Robinson, 9 Bing 717,
Belcher v Prittie, 10 Bing 408, *Van*
Casteel v Booher, 2 Exch 691, *Ogg v*
Shuter, L R 10 C P 165

(*o*) *Vaeher v Cocks*, 1 B & Ad 152,
Strachan v Barton, 11 Exch 650,
Johnson v Fesemeyer, 3 De G & J 13,
Exp London and County Bank, L R 16
Eq 391

(*p*) *Johnson v Fesemeyer*, *sup*
(*q*) *Brown v Kempton*, 19 L J C P
169, *Edwards v Glyn*, 2 E & E 29,
Bills v Smith, 34 L J Q B 68

(*r*) *Singleton v Butler*, 2 B & P
283

(*s*) *Belcher v Jones*, 2 M & W 258.
(*t*) *Thompson v Freeman*, 1 T R
155, *Harishon v Sladden*, 2 B & P.
584, *Crosby v Crouch*, 11 East, 256,
Stachan v Barton, 11 Exch 650 But
see *Exp Palmer*, W N (1882) 130

(*u*) *Belcher v Prittie*, 10 Bing
408

(*x*) *Edwards v Glyn*, 2 E & E
29

(*y*) *Alderson v Temple*, 4 Burr 2234,
Abell v Daniell, Moo & M 370

(*z*) *Davison v Robinson*, 3 Jur N S.
791

(*a*) *Morgan v Horseman*, 3 Taunt
241

(*b*) *Marshall v Lamb*, 5 Q B 116

(*c*) *Bevan v Nunn*, 9 Bing 107.

intention of the bankrupt; if such intention was to defeat the distribution of the property under the bankruptcy laws, the circumstance of there being a demand by the particular creditor would go for nothing; but if the moving cause was the solicitation of the creditor, and not the desire of the bankrupt himself to defeat the general distribution, that was no fraudulent preference (*d*)

Considerable difference of opinion prevailed as to the meaning of the words "in contemplation of bankruptcy" (*e*); but if the circumstances of the debtor were such that bankruptcy or insolvency was inevitable, that would satisfy the expression "in contemplation of bankruptcy" (*f*). Where the debtor executed the security when in embarrassed circumstances, and under expectation of going to prison, it was held to be a fraudulent preference, although no distinct act of bankruptcy was contemplated (*g*)

By sect 48 of the Act of 1883, two important alterations are introduced in the law relating to conveyances, &c on the ground of fraudulent preference

Alterations introduced by the Bankruptcy Act, 1883

Limit of time for avoidance.

First, by sub-sect (1), a conveyance by a debtor is now void, as a fraudulent preference, if made within three months before the presentation of a petition on which the debtor is adjudged bankrupt, and not, as under the Act of 1869, if made within three months before adjudication. Accordingly, a mortgage by a debtor of part or even of the whole of his property, will, on the expiration of three months without the presentation of a petition, be unimpeachable on the ground of fraudulent preference

Secondly, by sub-sect (2), the immunity afforded by the Act of 1869 is restricted so as no longer to protect a purchaser from, or incumbrancer of, the debtor in good faith and for valuable consideration, but only a "person making title in good faith and for valuable consideration through or under a creditor of the bankrupt." A creditor who takes security for his debt in ignorance that he is being preferred is therefore no longer within the statutory protection (*h*).

Restriction of immunity

(*d*) *Per* Parke, B, in *Van Casteel v Booker*, 18 L J Ex 9, 14, 20

(*e*) See the cases collected in Robson on Bankruptcy (5th ed), p 172

(*f*) *Johnson v Fesemeyer*, 3 De G & J 13, *Gibson v Boultis*, 3 Sc 229,

Gibson v Mushett, 4 Man & Gr 169

(*g*) *Alfred v Constable*, 4 Q B 674

(*h*) The effect of sect 48, sub-sect (2), is thus to abrogate the decision of the House of Lords in *Butcher v Stead*, L R 7 H L 839.

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Burden of
proof

Intention to
prefer, not
creditor's
knowledge
material

Whether
contemplation
of bankruptcy
is material

Effect of
pressure by
creditor

It was held, under the Act of 1869, and would probably be held under the present Act, that the onus of proving good faith and valuable consideration lies on the person who seeks to support a conveyance which would otherwise be void as a fraudulent preference (*i*)

An important result of the restriction of the immunity to persons deriving title under a purchaser or incumbrancer of the debtor, is to revive the rule of law, prior to the Act of 1869, that the question whether a particular transaction amounts to a fraudulent preference depends on the intention of the debtor to prefer, and not on the motives or privity of the creditor (*h*)

In other respects the definition of fraudulent preference given by the Act of 1883 is identical with that given by the Act of 1869.

The definition does away with the necessity of there being a contemplation of bankruptcy by the debtor (*i*), and it substitutes the fact of the debtor being unable to pay his debts, as they become due, out of his own money, and the presentation of a petition on which the debtor is adjudged bankrupt within three months after the transaction, for "the contemplation of bankruptcy," required under the former law (*m*) It is apprehended, however, that the fact that a mortgage was made by a debtor in contemplation of bankruptcy would still be material in determining whether the instrument is void as a fraudulent preference (*n*) Indeed, a man who is unable to pay his debts as they become due is insolvent (*o*), and must know that he is so, or he would not give to a particular creditor a security with the view of preferring him to other creditors (*p*); and a person in such a position and giving such a security must, it would seem, be presumed to contemplate bankruptcy (*q*).

In order to constitute a fraudulent preference, the mortgage or other conveyance must still be voluntary, and practically the old law, requiring the act to be the spontaneous act of the debtor, applies (*r*). The word "voluntary," in the technical

(*i*) See *Exp Tate*, 35 L T 531 See also *Williams on Bankruptcy*, p 213

(*h*) *Rust v Cooper*, Cowp 629, *Davidson v Rowlandson*, 3 Jur N S 791 See *Williams on Bankruptcy*, p 213

(*l*) *Exp Norton, Re Golden*, L R 16 Eq 398, 408

(*m*) See *Williams on Bankruptcy*, p 209,

(*n*) *Exp Tempest*, L R 6 Ch A 70, *Exp Blackburn, Re Cheesebrough*, L R 12 Eq 358, 363

(*o*) *Exp Pearce*, 2 D & C 451, 464

(*p*) *Bell v Simpson*, 2 H & N 410, *Bills v Smith* 34 L J Q B 68

(*q*) See *Williams on Bankruptcy*, p 210

(*r*) *Exp Tempest*, L R 6 Ch. A 70, *Exp Bolland, Re Cherry*, L R 7

sense which it had under the old law, means practically the same thing as "with a view of giving such creditor a preference over the other creditors" (s). If there is pressure, or a request by the creditor, the act is not fraudulent, the Court must be satisfied that the debtor's substantial motive was to prefer the creditor (t). It is not necessary that it should be the sole motive (u). If preference of a particular creditor or creditors is not the main or dominant motive, it is immaterial that the actual effect of the transaction is to prefer the secured creditor to the other creditors (x). If, however, the transaction is fraudulent in its inception, no pressure by the creditor will support it (y).

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A disposition will not generally be held to have the spontaneity necessary to constitute fraudulent preference where it is made in pursuance of a previous contract (z), or to make good a breach of trust (a); or to avoid a distress (b); or, apparently, under threat of legal proceedings to enforce payment (c), though in a later case it was held that threats of proceedings ought not to be regarded as pressure in the case of a man who was on the verge of, and contemplating, bankruptcy (d).

Spontaneity
necessary to
fraudulent
preference

Where the owner of certain furniture gave to his wife a bill of sale thereon to secure a *bonâ fide* advance, but subsequently, on discovering that the bill was void, by reason of its including after-acquired property, he gave to her a fresh bill of sale on the same furniture, it was held that, as in giving the second bill of sale the intention, in fact, was to correct the mistake in the first, this negatived any intention to prefer, and that the security was accordingly valid (e).

Substituted
security

Where, upon an advance, an agreement is made for a bill of sale at a subsequent period, the bill of sale will be treated as

Security
pursuant to
previous
contract

Ch. A. 24, *Exp Wreford*, 24 L. T. N. S. 638, *Exp Hallday*, L. R. 8 Ch. A. 283, *Smith v. Pilgrim*, 2 Ch. D. 127.

(s) *Exp Bolland*, *sup*, per Mellish, L. J., p. 27.

(t) *Exp Topham*, L. R. 8 Ch. A. 616, *Exp London and County Bank*, L. R. 16 Eq. 391.

(u) *Exp Hull*, 23 Ch. D. 695, C. A.

(x) *Exp Taylor*, *Re Goldsmid*, 18 Q. B. D. 295, C. A., *Re Mills*, *Exp Official Receiver*, W. N. (1888) 24, C. A.

(y) *Exp Reader*, *Re Wiggley*, L. R. 20 Eq. 763. See *Exp Arnold*, *Re Wright*, 3 Ch. D. 70, *Exp Saffery*,

Re Cooke, 4 App. Cas. 213, *Exp Boland*, *Re Gibson*, 8 Ch. D. 230.

(z) *Harman v. Fisher*, Cowp. 117; *Hunt v. Mortimer*, 10 B. & Cr. 44, *Exp Hodgkin*, *Re Softley*, L. R. 20 Eq. 746.

(a) *Exp Stubbins*, *Re Wilkinson*, 17 Ch. D. 53, C. A.

(b) *Mavor v. Croome*, 1 Bing. 261.

(c) *Exp Seadamore*, 3 Ves. 85, *Dixon v. Baldwin*, 5 East, 175, *Murray v. Penkett*, 12 Cl. & F. 764.

(d) *Exp Hall*, *Re Cooper*, 19 Ch. D. 580, per Jessel, M. R.

(e) *Re Tweedale*, *Exp Tweedale*, (1892) 2 Q. B. 216.

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having been executed at the date of the agreement (*f*), unless the giving of the bill of sale is purposely postponed till the situation of the trader is hopeless, or where the bill of sale is not to be given "until the lender has lost confidence in the borrower," or "until the lender requires it" (*g*), but in such case the promise to give the future bill of sale to be effectual must be absolute (*h*), and the *onus probandi* is upon the person who sets up the prior agreement to prove not only that the agreement did exist in fact, but that it was in all respects a *bond fide* agreement (*i*), and there must be a very clear explanation why the giving of the bill of sale was delayed (*k*), and the device of renewing the bill of sale from time to time will not avail (*l*). It would seem that the requirements of the Bills of Sale Act, 1882 (*m*), render an agreement to give a bill of sale altogether inoperative as a security, but the agreement might be material as evidence of the good faith of a bill of sale given in pursuance of the agreement, so as to prevent the bill from being set aside in bankruptcy.

Completion
of previous
security

If a *bond fide* deposit be made, and the debtor afterwards, and in immediate contemplation of bankruptcy, execute a conveyance of the legal estate to the creditor in completion of the mortgage, it is a good legal title, and will be protected by the equitable title previously obtained (*n*). And without such conveyance the deposit was entitled, even at law, to the rents, as against the assignees in bankruptcy of the depositor, since such assignees only took what the bankrupt or insolvent was entitled to at law and in equity (*o*). Where a landlord advanced a part of the purchase-money on the sale of a sub-lease by his lessee, and the sub-lease was immediately on its execution deposited with the landlord, he was held to have a lien by virtue of the deposit against the assignees of the sub-lessee, though he was at the time an uncertificated bankrupt, on the ground that the sub-lease and deposit were simultaneous transactions (*p*).

(*f*) *Mercer v Peterson*, L R 3 Ex 104; *Jones v Harber*, L R 6 Q B 77, *Exp Izard*, L R 9 Ch A 271, *Exp Hodgkin, Re Sofley*, L R 20 Eq 746, *Re Jackson, Exp Hall*, 4 Ch D 682.
(*g*) *Exp King*, 2 Ch D 256, C A, *Exp. Burton*, 13 Ch D 102, C A, *Exp Kilner*, 13 Ch D 245, C A.
(*h*) *Exp Fisher*, L R 7 Ch A 644.
(*i*) *Exp Kilner*, 13 Ch D 245, C A.
(*k*) *Ibid*, *Exp Hauxwell, Re Hemmings*, 23 Ch D 638.

(*l*) *Exp Cohen*, L R 7 Ch A 20, *Exp Stevens*, L R 20 Eq 786. But see *Re Jackson, Exp Hall*, 11 Ch D 682. And see *sup* p 242.
(*m*) 45 & 46 Vict c 43. See *ante*, p 229.
(*n*) *Per Lord Eldon in Hearn v Mill*, 13 Ves 114.
(*o*) *Garry v Shanatt*, 10 B & Cr 716, *Sumpster v Cooper*, 2 B & Ad 223.
(*p*) *Mewa v Smith*, 11 Sim 410.

An equitable mortgage for securing a voluntary bond debt is good against a subsequent bankruptcy, unless there be fraud or insolvency at the time (*g*)

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Inasmuch as a bill of sale transfers the property in the mortgaged chattels to the holder, it is no fraudulent preference for the grantor to give to the holder notice of impending bankruptcy, in consequence of which the holder seizes and sells the chattels (*r*)

Notice to secured creditor of impending bankruptcy

A trust deed by a partner assigning all his property for his separate creditors is a fraudulent preference (*s*), though his partnership assets are not specifically mentioned in the deed (*t*) The creditor cannot apply the principle of consolidation (*u*)

Trust deed by partner

An attornment clause in a mortgage, so framed as to amount to a mere device to enable the mortgagee to obtain thereby a preference over the other creditors on bankruptcy, is a fraudulent preference (*v*).

Attornment clause

So a licence in a builder's contract to seize materials on bankruptcy is void (*x*)

Licence to seize

No payment or composition made or security given after arrest made under sect 25 of the Bankruptcy Act, 1883, is exempt from the provisions of the Act relating to fraudulent preferences (*y*)

Payments after arrest

Under the present Act, as under the Act of 1869, a conveyance or charge which amounts to a fraudulent preference within the statutory definition is made void, not voidable only as under the former law (*z*)

Avoidance of conveyance

After composition resolutions have been passed and registered (*a*), a debtor cannot, before completion of the composition, enter into a valid agreement with a creditor who is bound by the resolutions to pay him his debt in full, even though the agreement is made for valuable consideration, such as an agreement by the creditor to give fresh credit to the debtor (*b*).

Securities given pending a composition.

(*g*) *Meggison v Foster*, 2 Y & C C C 336

(*r*) *Exp Symmons, Re Jordan*, 14 Ch D 693, C A

(*s*) *Exp McLean*, 24 L T. N S. 144

(*t*) *Exp Trevor*, 1 Ch D 297

(*u*) *Exp Hodgkin, Re Saffley*, L R 20 Ch D 746

(*v*) *Exp Williams, Re Thompson*, 7 Ch. D 138, C A, *Exp Jackson, Re*

Bowes, 14 Ch D 725, C A.

(*x*) *Exp Jay, Re Harrison*, 14 Ch D 19, C A.

(*y*) See also the Bankruptcy Act, 1890 (53 & 54 Vict c 71), s 7

(*z*) *Exp Tempest*, L R 6 Ch A 70

(*a*) Compositions are now regulated by sect 3 of the Bankruptcy Act, 1890, 53 & 54 Vict c 71

(*b*) *Exp Barrow, Re Andrews*, 18 Ch. D. 464, C A

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Secret securities

Securities given by a compounding debtor to a creditor before the passing of the composition resolution without communication to the other creditors, by which the creditor obtains preference over them, are void (*c*)

Agreement with surety

It makes no difference that the fraudulent creditor is surety for the composition (*d*); and a release contained in the composition deed is binding upon the fraudulent creditor (*e*)

Agreement with third party.

So, also, a similar agreement with a third person would be void. So where a banker, after proceedings for liquidation had been commenced against a customer, took from the customer's brother, without the knowledge of the other creditors, a guarantee that the loss to the banker should not exceed 2,000*l*, so as to induce the latter not to oppose the composition, it was held that the arrangement could not be sustained (*f*).

Where, however, the goods of a debtor were, by the terms of a composition, left at his disposal, a deposit of the goods as security with a person who guaranteed an instalment of the composition, was upheld (*g*)

Recovery of amount secured

The trustees of the bankrupt can recover the amount of the fraudulent security (*h*); and the debtor also can recover the amount from the creditor if he is compelled to pay the fraudulent security in the hands of a third party (*i*), and even if he has paid the money under the fraudulent agreement to the creditor himself (*h*)

Security to particular creditor in composition.

Where a security is given to some creditors for more than the composition, the executing creditors are not bound by the composition (*l*); and the secured creditor can neither recover upon the fraudulent security nor share in the composition (*m*). Indeed, it would seem that a creditor, who has practised a fraud

(*c*) *Cochshott v Bennett*, 2 T R 463, *Mallalieu v Hodgson*, 16 Q B 711, *Daughsh v Tennant*, L R 2 Q B 49, *Exp Phillips, Re Harvey*, 36 W R 567, *Exp Milner*, 15 Q B D 605

(*d*) *Wood v Barker*, L R 1 Eq 139, *Bussell v Jones*, L R 4 Q B 49

(*e*) *Exp Oliver*, 4 De G & J 354, *Mallalieu v Hodgson*, 15 Jur 817, Q B

(*f*) *McKewan v Sanderson*, L R 20 Eq 65

(*g*) *Exp Burrell, Re Robinson*, 1 Ch D 537, C A

(*h*) *Alsager v Spalding*, 8 Sc 204.

(*i*) *Bradshaw v Bradshaw*, 9 M & W 29, *Horton v Riley*, 11 M. & W 492

But see *Watson v Bennett*, 12 W R 1008

(*k*) *Smith v Cuff*, 6 M & S 160, *Smith v Bromley*, 2 Doug 697, note F 6, *Horton v Riley*, *sup*, *Athens v Denby*, 7 H & N 934, *Lensberg's Policy*, 7 Ch D 650. But see *Wilson v Kay*, 2 P & D 253, *Belcher v Sambourne*, 8 Jur 858, *Higgins v Pitt*, 4 Exch 312

(*l*) *Daughsh v Tennant*, L R 2 Q B 49, *Cullingworth v Lloyd*, 2 Beav 385, *Wood v Barker*, L R 1 Eq 139. See *Bush v Shapman*, 10 Jur. 507 see Robs Bky 249, ed 4

(*m*) *Howden v Haigh*, 3 P & D 661

of this sort on the other creditors, will not, if the composition is not paid and the debtor becomes bankrupt, be allowed to prove under the bankruptcy for either his original debt or the composition (*n*)

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And where a debtor obtained the consent of one of his creditors to a composition by a secret promise to pay his debt in full, which promise he performed and afterwards became bankrupt, the creditor was not allowed to prove a new debt, without first deducting the sum so paid to him beyond the former composition (*o*).

The protection afforded by sect 49 extends to a payment in good faith and for valuable consideration, although the transaction would otherwise be a fraudulent preference and an act of bankruptcy (*p*)

Extent of protection of sect 49

Mortgages, whether of the whole of a debtor's property or only of a part thereof, given to secure an actual present advance only, are clearly protected by sect 49 of the Act, provided they are given previously to the date of a receiving order made against the mortgagor, and that the mortgagee has not notice of any available act of bankruptcy (*q*)

Mortgage to secure present advance

The notice intended by the Act is actual notice of a complete act of bankruptcy (*r*).

Notice

A *bonâ fide* sale by a trader of all his stock has long been held to be valid as against his trustee in bankruptcy, if the purchaser was ignorant of any fraudulent intention on the part of the trader (*s*), although the purchaser had knowledge that an execution is intended (*t*), and later, this principle was extended so as to render valid a *bonâ fide* assignment by way of mortgage of all a person's property to secure a present advance of which the mortgagor obtains, at the time, the full benefit (*u*).

Bonâ fide mortgage of whole property

There must be an equivalent (*x*), but if the security is for a

(*n*) *Re Cross*, 4 De G & S 364, note

(*o*) *Exp Minton*, 1 M & A 440

(*p*) *Exp. Blackburn*, W N (1884) 131, C A

(*q*) "Available act of bankruptcy" means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made See sect 163 of the Act of 1883

(*r*) *Conway v Nall*, 1 C B 643,

Bird v Bass, 6 Man & Gr 143

(*s*) *Baxter v Pritchard*, 1 A & E 456, *Rose v Haycock*, 1 A & E 460, n. And see *Harwood v Barlett*, 6 Bing. N C. 61.

(*t*) *Wood v Drane*, 7 Q B 392, *Hale v Metropolitan Saloon Omnibus Co*, 4 Drew 492

(*u*) *Whitwell v Thompson*, 1 Esp 68 See *Cannan v Deneu*, 10 Bing 292, *Fearnley v Wright*, 6 Bing N C 446

(*x*) *Hutton v Crutwell*, 1 E & B. 15,

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present substantial advance, it is not necessary that the full value of the property be advanced (*y*).

It has been held that a *bonâ fide* sale for a present consideration will not be invalid as a fraudulent conveyance simply because the vendor intends to misapply the purchase-money or to abscond with the money, and so defraud his creditors, provided there is no fraudulent collusion on the part of the purchaser (*z*); and the same principle applies in the case of a mortgage (*a*).

Mortgage to secure existing debt and present advance

A security given *bonâ fide* for a present advance will not be invalidated merely because it extends to secure an antecedent debt (*b*). But where a mortgage is given to secure an existing debt and also a further present advance, questions of complication and difficulty sometimes arise as to the *bona fides* of the transaction.

Test of *bona fides* in such cases.

In the case of a trader, the validity of the transaction in bankruptcy will depend on whether the present advance is an equivalent by enabling the debtor to carry on his business. "The greatness or smallness of the advance made by the lender to the grantor, though to be taken into consideration, is not the real test. The real test is (whatever the amount of the advance compared with the antecedent debt was), did the lender intend that the advance should enable the debtor to carry on his business, and had he a reasonable ground for believing that it would enable him to do so?" (*c*). In such a case, the Court will not go into the intention of the debtor, nor consider that the result of the transaction was in fact that the business could not be carried on (*d*). So, conversely, the security will be bad if it appears on the evidence that the lender advanced his money with the purpose not of enabling the debtor to meet his engage-

Brittlesome v Cooke, 6 E & B 296, *Harris v Rickett*, 4 H & N 1, notwithstanding *Exp Sparrow*, 2 De G M & G 907.

(*y*) *Brittlesome v Cooke*, *sup*, *Allen v Bonnett*, L R 5 Ch A 577.

(*z*) *Cook v Caldwell*, Moo & M 522, *Baxter v Pritchard*, 1 A & E 456, *Exp Stubbins*, *Re Wilkinson*, 17 Ch D 58, O A.

(*a*) *Re Colemere*, L R 1 Ch A. 128.

(*b*) *Pennell v Reynolds*, 11 O B N S 709, 722, *Shrubsole v Sussams*, 16 C B N S 452, *Lomax v Buxton*, L R 6 C P 107.

(*c*) *Exp. Johnson*, *Re Chapman*, 26

Ch D 338, C A, *per* Cotton, L J, at p 346. See also *Exp King*, *Re King*, 2 Ch D 256, C A, *Exp Ellis*, 2 Ch D 797, C A. These three cases were cited and approved as good law and good sense by the Privy Council in *Admon -Gen of Jamaica v Lascelles*, (1894) A C 135. See also *Bell v Simpson*, 2 H & N 410, *Whitmore v Dowling*, 2 F & F 134, *Pennell v Dawson*, 18 C B 355, *Allen v Bonnett*, L R 5 Ch A 577, *Exp Fisher*, L R 7 Ch A 644.

(*d*) *Exp Johnson*, *Re Chapman*, 26 Ch. D, at p 347.

ments, and, if a trader, to continue his business, but of giving the lender a security in preference to other creditors (e). CHAP XXXI

If the creditor makes a present advance with the *bonâ fide* intention of enabling the debtor to carry on his business, the security will not be avoided, though the creditor is aware that the debtor intends to apply the money advanced to pay off an existing debt so as to relieve the estate from distress or other proceedings (f). So it was held that an actual sale of goods for money, the vendor intending to make a fraudulent preference with the purchase-money, was not a fraudulent transfer, although the purchaser knew of the transaction (g). It may be, in some cases, that the relief of a debtor's estate from distress or other pressure affords the only prospect of his being able to carry on his business.

A present advance, if made *bonâ fide* by a creditor to enable the debtor to carry on his business, need not be of large amount in proportion to the subsisting debt or to the property mortgaged (h). Smallness
of present
advance

The smallness of the amount of the advance, however, affords strong evidence that the principal object of the parties in the whole transaction was not to enable the debtor to continue his trade but to secure to the creditor the repayment of his past advance (i).

Conversely, it would seem that the fact that the further advance is of a substantial amount will be regarded as affording a presumption that the object was to enable the debtor to continue his trade, so as to support the mortgage (k). And if this is the case, the transaction will be supported, though no advance is actually made at the time, and though the security merely recites an agreement, but contains no covenant by the creditor, to make the further advances which are made afterwards (l). Effect where
material
advance is
made or
agreed

The fact that future advances were contemplated will not suffice, if there is no agreement to that effect (m), but it is Mere con-
templation of
advance not
sufficient

(e) *Re Juleff, Exp Hole*, W N (1883) 32

(f) *Whitmore v Clardge*, 31 L J Q B 141, *Hutton v Cruttwell*, 1 E & B 15. See also *Exp Swilchenbart*, 3 M D & De G 671, *Re Coleman*, L R 1 Ch A 128, *Exp Reed, Re Tweedell*, L R 14 Eq 586

(g) *Exp Stubbins, Re Wilkinson*, 17 Ch D 58, C A

(h) *Exp Threlfall, Re Walhamson*, 35 L T 675, *Exp Evans, Re Edwards*,

39 L T 364

(i) *Exp Fisher, Re Ash*, L R 7 Ch A 636, 644, *Exp Ellis*, 2 Ch D 797, C A. See *Exp Winder*, 1 Ch D 290, *Exp Greener*, 46 L J Bky 76, C A

(k) *Exp Sheen, Re Winstanley*, 1 Ch D 560, C A

(l) *Exp Winder, Re Winstanley*, 1 Ch D 290

(m) *Exp Dunn, Re Parker*, 17 Ch D 26, C A

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sufficient if such agreement is contained in the assignment, although the mortgagee does not sign it (*n*)

The fact that further advances are afterwards made, but without any undertaking to make them, is not sufficient (*o*)

Secret promise
to pay other
creditors

It is not a fair equivalent when the assignee makes a secret verbal promise to pay all the assignor's creditors, from whom it is studiously concealed, and who have no power to enforce it (*p*)

Test in case
of traders

In considering whether a trader receives an equivalent consideration for the security sufficient to enable him to carry on his business, the nature of the business may be taken into consideration, so that a present advance of small amount compared with the existing debt may be sufficient, in the case of a trader in a small way of business, to raise the presumption that the advance was intended and might reasonably be expected to enable him to carry on his business (*q*).

A mortgage of all a debtor's property given to secure an existing debt and further advances will be good, if it appears that the main object is to secure further advances in order that the borrower may be enabled to continue his business (*r*)

A bill of sale to secure an existing debt and a present advance will not necessarily be void as a fraudulent conveyance by reason of its including the whole of the debtor's present property and also property intended to be purchased with the moneys advanced, provided the transaction is made with the intent to enable the debtor to carry on his business (*s*)

Test in case of
non-traders.

With regard to non-traders (*t*), no definite rule appears to have been laid down by any judicial decision. It would seem that the test that the creditor's intention in making the further advance is to enable the debtor to carry on his business for the benefit of his creditors, will be applied in the case of persons engaged in businesses which are not, strictly speaking, trades (*u*). But in the case of a person of no occupation, it is obvious that this test could not be applied, and it would seem difficult to

(*n*) *Exp Wilkinson, Re Berry*, 22 Ch D 788, C A.

(*o*) *Exp Cooper*, 10 Ch D 313, C A, *Exp Dann, Re Parker*, 17 Ch D. 26, C A.

(*p*) *Exp Chaplin, Re Sinclair*, 26 Ch. D. 319, C. A.

(*q*) *Exp. Evans, Re Edwards*, 39 L. T. 364.

(*r*) *The Thames*, 63 L. T. 353.

(*s*) *Exp Hauxwell, Re Hemmingway*, 23 Ch D 638, C. A.

(*t*) The Act of 1883 contains no definition of traders. Sect 65 of the Bankruptcy Act, 1849, contained a definition of the term for the purposes of that Act.

(*u*) *Admor - Gen. of Jamaica v Lascelles*, (1894) A. C. 135.

show that the advance was made with the intention and reasonable expectation that the creditors would derive any benefit therefrom

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It is doubtful whether a new security can be enforced, or action brought on any new contract, for recovery of a debt included in a bankrupt's discharge (*x*).

New security
for debt
barred by
bankruptcy.

Irrespective of enactment, it has been held in many cases that a debt, though barred by a certificate, is a sufficient consideration for a promise to pay it (*y*). The *ratio decidendi* of the cases was, that the remedy only was gone, but that the debt continued to exist; and so there was such a moral obligation to pay it as would afford a sufficient consideration to support the express promise (*z*).

By 6 Geo IV. c 16, s. 131, no bankrupt was liable upon a promise to pay a debt discharged by a certificate, unless the promise were in writing

Course of
legislation.

By the Bankruptcy Act, 1849 (*a*), and the Bankruptcy Act, 1861 (*b*), no action could be brought on such a promise, whether verbal or written

Those Acts are repealed by the Bankruptcy Act, 1869 (*c*), and neither that Act nor the Bankruptcy Acts now in force (*d*) contain any enactment on the subject; but by sect 30 of the Act of 1883, in any proceedings in respect of any debt discharged, the bankrupt may plead his discharge

Under the corresponding sect. 49 of the Act of 1869, a bill of exchange given, after the repeal of the old Acts, for a debt barred while they were in force, was held void (*e*), and a promise to pay a debt discharged, without any new consideration, is void as *nudum pactum* (*f*), but such promise was held to be valid if there was any new consideration (*g*). Such promise, however, will not be valid if the bankrupt has not been discharged, as where a composition has not been completed (*h*).

Whether such
security is
void under the
present law

Any bill of sale, warrant of attorney, or promissory note, merely for the old debt, was void under the repealed statutes (*i*),

(*x*) *Ashley v Killock*, 5 M & W 509

(*y*) *Kirkpatrick v Tattensall*, 13 M & W. 770

(*z*) *Ford v Dornford*, 10 Jur 285, Q B

(*a*) Sect 204

(*b*) Sect 164

(*c*) 32 & 33 Vict c 71

(*d*) 46 & 47 Vict c 52, 53 & 54

Vict c 71

(*e*) *Rimm v Van Praagh*, L R 8 Q B 1

(*f*) *Jones v Phelps*, 20 W R 92, *Heather v Webb*, 2 C P D 1

(*g*) *Jakeman v Cook*, 4 Ex D 26

(*h*) *Exp Barrow, Re Andrews*, 18 Ch D 464, C A

(*i*) *Peakman v Harrison*, L R 14 Eq 484, *Exp Hart*, 2 D & L 778;

xxx. but, if the new security were under seal, which requires no consideration, it would apparently have been valid. And it would seem, in the absence of judicial decision to the contrary, that such a security would be good at the present day.

ulent
ence

iv.—Fraudulent Preference in Winding-up of Companies —
The Companies Act, 1862, contains the following provision —

Sect 164 "Any such conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such trader shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and shall be invalid accordingly, and for the purposes of this section the presentation of a petition for winding up a company shall, in the case of a company being wound up by the Court or subject to the supervision of the Court, and a resolution for winding up the company, shall, in the case of a voluntary winding up, be deemed to correspond with the act of bankruptcy in the case of an individual trader, and any conveyance or assignment, made by any company formed under this Act of all its estate and effects to trustees for the benefit of all its creditors, shall be void to all intents."

This section is only intended to apply in the case of a winding up, and, as in bankruptcy (*l*), for the benefit of the general creditors, and accordingly the doctrine of fraudulent preference cannot be taken advantage of by an individual creditor in a debenture-holders' action (*l*).

In determining whether a security given by a company is void under sect. 164, the Court will strictly regard the definition of "fraudulent preference" given by the Bankruptcy Act, 1883 (*m*).

In order to avoid the security on the ground of fraudulent preference, there must be a contemplation of a winding-up, and there must, generally, be an absence of pressure (*n*).

Thus, a security not exhausting the whole property of the

Sheerman v Thompson, 11 A. & E. 1027, *Kidson v Turner*, 27 L. J. Ex. 492.

(*k*) See ante, p. 584.

(*l*) *Willmott v London Celluloid Co.*, 34 Ch. D. 147, C. A.

(*m*) 46 & 47 Vict. c. 52, s. 48, ante, p. 585.

(*n*) *Re Inns of Court Hotel Co.*, L. R. 6 Eq. 82. See *Willmott v London Celluloid Co.*, 34 Ch. D. 147, C. A.

company, and given in consequence of a demand by the creditor at a time when there was nothing to show that a winding up of the company was then contemplated, is not a fraudulent preference (o) CHAP XXXI

A security given by an insolvent company for payment of a debt due to a director cognisant of the state of the company's affairs may be set aside as an undue preference under this section, even although the director may have pressed for payment of his debt (p). Security to director

(o) *Re Patent File Co, Ex p Birmingham Banking Co*, L R 6 Ch A 83 *Terrell*, L R 10 Eq 168 And see
 (p) *Gashghat Improvement Co v Sykes' Case*, L R 13 Eq 255, *Habershon's Case*, L R 5 Eq 286,

CHAPTER XXXII.

OF THE AVOIDANCE OF MORTGAGES AS BEING CONVEYANCES
IN FRAUD OF PURCHASERS, ETC., UNDER THE STATUTE
27 ELIZ. C. 4.

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i.—The Statute 27 Eliz. c. 4.—This statute (*a*), after stating in the preamble that great loss had been incurred by reason of fraudulent and covinous conveyances, gifts, &c, made or to be made out of lands, tenements, and hereditaments purchased, or to be purchased, which said gifts, &c., “were or hereafter shall be meant and intended by the parties that so make the same to be fraudulent and covinous of purpose, and intent to deceive such as shall have purchased or shall purchase the same, or else by the secret intent of the parties, the same to be to their own proper use and at their free disposition, coloured nevertheless by a feigned countenance and show of words and sentences, as though the same were made *bond fide* for good causes and upon just and lawful consideration,” enacts in effect, by sect 1, that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses of, in or out of, any lands, tenements, or other hereditaments whatsoever, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall afterwards purchase in fee simple, fee tail for life, lives, or years, the same lands, tenements, and hereditaments, or any part thereof, or any rent, profit or commodity, in or out of the same or any part thereof, are declared void, as against purchasers for money or good consideration, and persons claiming under them.

Saving, however (by sect. 3), all estates in and assurances of lands made for good consideration and *bond fide*

By sect 4, every conveyance or assurance of lands, with a clause of revocation, is declared to be void as against a subse-

(*a*) Made perpetual by the stat 39 Eliz c. 18, s. 31

quent assurance of the same hereditaments or any part thereof made without exercise of the power of revocation, for money or other good consideration. Provided that no lawful mortgage, made *bonâ fide* without fraud upon good consideration, shall be impeached by force of the Act.

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Copyhold and other estates and interests in land are within the stat. 27 Eliz. c. 4 (b), but not personal estate (c).

Property
within
27 Eliz c 4

ii.—The Consideration.—It will be observed that the expression “voluntary conveyance” does not occur in this statute (d); but ever since the passing of the Act it has been held, in a long series of decisions, that such conveyances are fraudulent within the meaning of the Act, though made without any intent to defraud (e). A conveyance for good and meritorious but not valuable consideration, and although free from actual fraud (f), is voluntary, and, because voluntary, fraudulent and capable of being set aside in favour of a subsequent mortgagee or other purchaser for value, even with notice of the voluntary conveyance (g).

Voluntary
conveyances
fraudulent
within the
Act

A conveyance, however, is not voluntary, if there is anything in the nature of consideration which can be called valuable (h). Questions as to what consideration is sufficient to support a conveyance under this statute have frequently arisen with regard to settlements (i). But such questions can seldom arise in the case of mortgages, except where a security is given for a past debt (h). In such a case, pressure by the creditor, or the fact that the mortgage was made pursuant to an agreement antecedent to or contemporaneous with the loan, would be deemed to be a sufficient consideration to take the mortgage out of the mischief of the statute. And even if no such agreement were proved, it would seem that, after lapse of time, it would be presumed (l).

What con-
sideration is
sufficient to
support con-
veyance

(b) *Doe v Bottrell*, 5 B & Ad 131, *Curre v Nind*, 1 My & Cr 17, *Doe v Rolfe*, 8 A & E 650

(c) *Bull v Cureton*, 2 My & K 503, 512, *Watson v Parker*, 10 Jur N S 577, *Jones v Coucher*, 1 S & St 315

(d) See *supra*

(e) *Burrell's Case*, 6 Rep 72, *Gooch's Case*, 5 Rep 60, *Standen v Bullock*, Moo 605, 615, *Doe v Manning*, 9 East, 57, *Trowell v Shenton*, 8 Ch D 318

(f) *Buckle v Mitchell*, 18 Ves 100

(g) *Doe v Manning*, 9 East, 59, *Chapman v Emery*, Cowp 278, *Goodright v Moses*, 2 W Bl 1019

(h) *Re Foster*, 6 Ch D 89, *Hewson v Negus*, 22 L J Ch 655, L JJ, *Teasdale v Braithwaite*, 5 Ch D 630, C A

(i) As to what amounts to valuable consideration in such cases, see *Valzey on Settlements*, pp 1538 *et seq*

(k) *Lloyd v Attwood*, 3 De G & J 614

(l) *Cracknell v Janson*, 11 Ch D 1, C A

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consideration
may be proved
in the deed

Although the deed be apparently voluntary, the consideration may be proved *aliunde* (m); but the onus of proving some valuable consideration generally falls on the person sustaining the deed (n)

conveyances
under
statute on
ground of
d

A deed may be fraudulent within the stat 27 Eliz c 4, and therefore void as against a purchaser for value, independently of the question as to whether it is or is not voluntary. Thus a secret mortgage to secure a valid debt, retained by the mortgagor for his own purposes, is fraudulent within the statute against a *bonâ fide* mortgagee (o). So also a mortgage to a relative, the title deeds being left with the mortgagor to enable him to raise money on them, is fraudulent (p), and the assignee for value from the mortgagee, if he allows the deeds to remain with the original mortgagor, is also postponed (p); and a settlement is fraudulent if it reserves to the settlor an unlimited power to mortgage (q); but a power to charge with a particular sum is not so (r); and it is fraudulent if it reserve a power to make leases for any term with or without rent (s); but a power to be exercised with the consent of a third person is not (t).

voluntary
conveyances
Act, 1893

By the Voluntary Conveyances Act, 1893 (u), it is enacted as follows:—

voluntary
conveyances,
bonâ fide,
to be
void under
27 Eliz c. 4

Sect. 2 “Subject as hereinafter mentioned, no voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of this Act, if in fact made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent or covinous within the meaning of the Act 27 Eliz c 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of the said Act by a conveyance made upon any such purchase, any rule of law notwithstanding.”

voluntary trans-
actions com-
pleted before
passing of
the Act

Sect. 3 “This Act does not apply in any case in which the author of a voluntary conveyance of any lands, tenements, or hereditaments has subsequently, but before the passing of this Act, disposed of or dealt with the same lands, tenements, or hereditaments, to or in favour of a purchaser for value.”

definition of
convey-
ance”

Sect. 4. “The expression ‘conveyance’ includes any mode of disposition mentioned in or referred to in the said Act of Elizabeth.”

application
to Ireland

Sect. 5. “This Act shall extend to Ireland, and, as applied to Ireland, shall be read and construed as if the Act of 10 Car. I.

(m) *Pott v Todhunter*, 2 Coll 76,
Gale v Wilhamson, 8 M & W 405

(n) *Kelson v Kelson*, 10 Ha. 385

(o) *Cracknell v Janson*, 11 Ch. D 1,
C A

(p) *Perry-Herrick v Attwood*, 2 De
G & J. 21; *Lloyd v Attwood*, 3 De G.
& J. 614.

(q) *Turbach v Marbury*, 2 Vern
510

(r) *Jenkins v Keyms*, 1 Lev 150

(s) *Lavender v Blakstone*, 2 Lev.
146

(t) *Butler v Waterhouse*, 2 Show. 46.

(u) 56 & 57 Vict. c. 21.

sess 2, c 3 (Ireland), were substituted for the said Act of Elizabeth "

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The result of this Act appears to be to render it unnecessary to show good consideration in order to support a *bonâ fide* mortgage of lands as against a subsequent incumbrancer or purchaser for value thereof, except in cases where the subsequent incumbrance or purchase has been effected before the 29th of June, 1893, the date of the passing of that Act

Effect of Act of 1893

The Voluntary Conveyances Act, 1893, only prevents conveyances from being avoided on the ground of want of consideration as against a subsequent purchaser for value, under the statute 27 Eliz c. 4, but leaves that statute to operate as before so as to avoid conveyances which are fraudulent irrespectively of the question of consideration

iii.—Against what Purchasers, &c, a Fraudulent Conveyance is avoided.—A mortgage, like any other conveyance or other disposition which is voluntary or fraudulent within the Act of Eliz, is void as against a purchaser for valuable consideration and persons claiming under him.

Who are purchasers within the statute

An equitable purchaser is within the statute (*x*), and a mortgagee is a purchaser *pro tanto* within it (*y*), as also an equitable mortgagee (*z*), and a mortgagee by deposit of title deeds (*a*), although the contrary was held at law (*b*); also the purchaser under a settlement made in consideration of an intended marriage (*c*); so a person who releases a contested right in consideration of the conveyance to him (*d*), also lessees at rack rent (*e*); but a lessee without fine or rent is not (*f*).

Equitable purchasers and mortgagees, &c

Persons claiming under ante-nuptial settlements are purchasers (*g*); so if under post-nuptial settlements made in consideration of ante-nuptial articles, or of an additional portion (*h*)

Persons claiming under settlements

A husband of a volunteer cannot on his marriage be treated as

(*x*) *Barton v Vanheythausen*, 11 Ha 126

(*y*) *Chapman v Emery*, Cowp 278, *White v Hussey*, Prec in Ch 13, *Lester v Turner*, 5 Ha 281, *Lloyd v Attwood*, 3 De G & J 614

(*z*) *Lloyd v Attwood*, *sup*

(*a*) *Lester v Turner*, *sup*, *Ede v Knowles*, 2 Y & C C C 172

(*b*) *Kerison v Dorrien*, 9 Bing 76, *Holford v. Holford*, 1 Ch. Ca. 217.

(*c*) *Douglas v Ward*, 1 Ch Ca. 79

(*d*) *Hill v Bishop of Exeter*, 2 Taunt 69

(*e*) *Goodnight v Moses*, 2 W Bl 1021

(*f*) *Upton v Bassett*, Cro Eliz 444.

(*g*) *Martin v Seamore*, 1 Ch Ca 170

(*h*) *Doe v Rowe*, 4 Bing N C 737. See *Trowell v Shenton*, 8 Ch. D. 318.

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a purchaser under the statute (*g*) nor is a person claiming under a post-nuptial settlement, unless made in pursuance of articles which were entered into before the marriage (*h*) and are binding (*i*)

Judgment
creditor

A judgment creditor is not a purchaser within the statute (*h*) for he cannot be said to be one who gives money or other valuable consideration in order to have the land (*l*)

Cases under
former law

In cases not falling within the Voluntary Conveyances Act 1893, the following points have been decided:—

Purchaser
from heir or
devisee

The heir-at-law or devisee of the settlor cannot avoid the deed by a mortgage or conveyance for value (*m*)

Title under
conveyances
voidable
under the
statute

Where a fraudulent conveyance is made to a man who makes a mortgage *bonâ fide*, and the conveyance is set aside by the creditors of the grantor, the title of the mortgagee is paramount to that of the creditors (*n*)

A voluntary grantee has, against all other persons except a purchaser for value, a complete estate, and can set aside a previous voidable conveyance (*o*) A purchase without notice from a voluntary grantee is valid (*p*).

The existence of a voluntary settlement on the title is not a valid objection (*q*)

Specific de-
scription not
necessary

A voluntary settlement may be avoided in favour of a subsequent mortgagee to whom the settlor's lands are conveyed by a general description, such as "all and singular my real estate," not specifically referring to the lands comprised in the settlement (*r*)

Conveyance
or value sub-
ject to "all
charges"

It was held in an Irish case (*s*) that where a conveyance for value was expressly made subject to all existing charges, it did not avoid a prior voluntary charge under the stat 10 Car I sess 2, c 3.

(*g*) *Collins v Burton*, 5 Jur N S 952, reversed on other points, 4 De G & J 612, *Doe v Lewis*, 11 C B 1035

(*h*) *Martin v Seamore*, 1 Ch Ca 170

(*i*) *Doe v Rowe*, 4 Bing N C 737 See *Trouell v Shenton*, 8 Ch D 318

(*k*) *Beavan v Lord Oxford*, 6 De G M & G 507, *Dolphin v Aylward*, L R 4 H L 416, overruling *Garth v Ensfield*, Bridg 22, *Guthing v Lowther*, 2 Rep in Ch 136 See *Barton v Vanheythusen*, 11 Ha 131

(*l*) 6 De G M & G at p 517, per L. C

(*m*) *Parker v. Carter*, 4 Ha 409,

Doe v Lewis, sup, *Doe v Rusham*, 16 Jur 359, Q B, *Lewis v Rees*, 3 K & J 132, explaining *Burrell's Case*, 6 Rep 72, and observing on *Jones v Whitaker*, 1 Long & Town 141

(*n*) *Major v Ward*, 5 Ha 598

(*o*) *Dickinson v Burrell*, L R 1 Eq 337

(*p*) *Doe v Martyr*, 1 B & P N R 332

(*q*) *Butterfield v Heath*, 15 Beav 408, *Clarke v Willott*, L R 7 Ex 313

(*r*) *Barton v Vanheythusen*, 11 Ha. 131

(*s*) *Blake v Blake*, 19 L R Ir 261.

The subsequent purchaser or mortgagee can recover in an action for land (as he could formerly by ejectment) against the volunteer (*t*), and he may bring an action to complete his purchase or mortgage and set aside the voluntary deed. The volunteer is a proper party to a suit by the purchaser or mortgagee to set the voluntary deed aside (*u*), but the volunteer has no equity to the purchase-money (*x*). And even if the sale is effected under a power contained in the voluntary settlement, the purchaser can safely pay the vendor the purchase-money, although, by the settlement, it ought to be held upon the trusts of the settlement (*y*).

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Rights and remedies of purchaser or mortgagee seeking to avoid as fraudulent conveyance

The purchaser or mortgagee cannot require the voluntary settlement to be delivered up to be cancelled (*z*).

The settlor is himself bound by the settlement, and cannot bring an action to compel the purchaser to complete the contract (*a*), unless the defendant is a willing purchaser (*b*). Nor can the purchaser or mortgagee obtain relief in a suit instituted to set aside the settlement by himself and the settlor as co-plaintiffs (*c*).

The volunteer may, however, show, by evidence of the inadequacy of the consideration, that the purchase was colourable (*t*). And the declarations of the mortgagor are not admissible after his death to prove payment of the mortgage money against the parties claiming under the settlement (*d*).

(*t*) *Doe v James*, 16 East, 212

(*u*) *Townend v Toker*, L. R. 1 Ch A 446

(*x*) *Ibid*, *Daking v Whumper*, 26 Bea v 568

(*y*) *Evelyn v Templar*, 2 Bro C C 148

(*z*) *De Hoghten v Money*, L. R. 2 Ch

A. 164

(*a*) *Clarke v Willott*, L. R. 7 Ex 313, *Smith v Garland*, 2 Mer 123. See *Ayerst v Jenkins*, L. R. 16 Eq 275

(*b*) *Peter v Nicolls*, L. R. 11 Eq 391.

(*c*) *Bull v Cusston*, 2 My & K 503

(*d*) *Doe v Webber*, 1 A. & E 733

CHAPTER XXXIII.

OF AVOIDANCE OF MORTGAGES AS BEING EXTORTIONATE.

general rule. **i.**—Of Mortgages by Persons under Undue Influence generally —
Mortgages for inadequate or no consideration given to persons standing in a fiduciary or other relation to the mortgagor, by which he is subject to undue influence, are liable to be set aside and treated only as securities for so much money as can be proved to have been advanced, with interest at a reasonable rate

inadequate consideration
Inadequacy of consideration alone does not give any title to relief (a) But such inadequacy, or the exorbitant terms of a bargain for a loan to a person who is in pecuniary distress may be material as indicating that the lender took advantage of the borrower's position so as to exercise undue influence over him So, where a money lender, advertising loans on easy terms, induced a farmer to give a bill of sale securing interest at 125 per cent per annum, the bill of sale was set aside (b)

security for loan by trustee to cestui que trust
There is no rule of law or equity that a trustee may not lend money to his *cestui que trust* on the security of trust property ; but such a case is regarded by the Court with some jealousy, as it must be assumed that the trustee has acquired much information as to the nature and value of the property, and he will not be allowed to foreclose, as his duty is to take every possible step for saving the estate (c) A trustee cannot bargain for a benefit to himself with his *cestui que trust* (d)

instances of undue influence
Cases of undue influence arise where the borrower is a person of weak intellect (e) ; or where there exists the relation of child

(a) *Guest v Harrison*, 8 H L C 481

(b) *Moorhouse v Wolfe*, 46 L T 374

(c) *Tennant v Trenchard*, L R 4 Ch A 537

(d) See *Vaughton v Noble*, 30 Beav 39

(e) *Longmate v Ledger*, 2 Giff 157

and parent (*f*); or person standing in *loco parentis* (*g*); or ward and guardian (*h*); or client and solicitor (*i*); or patient and medical attendant (*k*); or where one party has obtained a spiritual ascendancy over another (*l*); or where any person transacts business with another under whose influence he may be supposed to be (*m*). The rule stands on a general principle applying to all the variety of relations by which dominion may be exercised by one person over another (*n*). Some of the decisions cited in the notes relate to cases of gifts obtained by undue influence; but the principles stated therein seem equally to apply to cases of unconscionable bargains by way of loan.

Dealings between a child and his parent are regarded with great jealousy by the Court, especially if the child has only recently come of age, as he is peculiarly liable to be unduly influenced to the advantage of his parent by the exercise of parental authority and pressure (*o*). Relation of parent and child

If, however, a transaction between a child and his parent is *bonâ fide* and reasonable, it will not be set aside (*p*).

Similarly, the Court is extremely watchful to prevent a guardian from taking advantage, immediately upon his ward coming of age, and at the time of settling accounts, because undue influence may be taken (*q*). *A fortiori*, if the accounts are not settled, or if the guardian still retains control over the property of his late ward (*r*). Guardian and ward

This principle applies to persons acting as guardians, though not legally constituted guardians (*s*).

Transactions between wards and their guardians are liable to

(*f*) *Carpenter v Herrvot*, 1 Ed 338
And see *infra*

(*g*) *Archer v Hudson*, 7 Beav 551,
Espey v Lake, 10 Hare, 260

(*h*) *Montesquieu v Sandys*, 18 Ves 313,
Maitland v Irving, 15 Sim 437,
Archer v Hudson, 7 Beav 551

(*i*) See *infra*

(*k*) *Dent v Bennett*, 4 My & Cr 262
But see *Blackie v Clark*, 15 Beav 595

(*l*) *Norton v Relly*, 2 Ed 286,
Nottage v Prince, 2 Giff 246
See *Kirwan v Cullen*, 4 Ir Ch R 322,
Maccabe v Hussey, 2 Dow & C 440
See also *Lyon v Home*, L R 6 Eq 655

(*m*) *Kay v Smith*, 7 H L C 750

(*n*) Per Sir S Romilly, arg in *Huguennin v Baseley*, 14 Ves 273, adopted by Wright, J, in *Morley v. Loughnan*,

(1893) 1 Ch 736, 752

(*o*) *Carpenter v Herrvot*, 1 Ed 338,
Baker v Bradley, 7 De G M & G 597
See also the following cases of gift, &c., *Cocking v Pratt*, 1 Ves 401,
Hoghton v Hoghton, 15 Beav 278,
Turner v Collins, L R 7 Ch A 329, and cases there cited

(*p*) *Blackborn v Edgley*, 1 P Wms 600

(*q*) *Hylton v Hylton*, 2 Ves 547
See *Aylward v Kearney*, 2 Ba & Be. 463

(*r*) *Pease v Waring*, 1 P Wms 120, n, *Hylton v Hylton*, *sup*, at p 549

(*s*) *Griffin v De Veuille*, 3 P Wms 131, n, *Huguennin v Baseley*, 14 Ves 273, at p 283, *Hylton v Hylton*, *sup*.

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Unconscion-
able mort-
gage set
aside after
lapse of time

Independent
advice

Unconscion-
able mortgage
may be valid
if parties are
strangers

Indirect
exercise of
undue in-
fluence

be set aside after considerable lapse of time if it appears that the influence induced by the relationship has continued direct or indirectly (t)

Where a confidential relation is proved to have existed between the parties, the dealings between them may be set aside on the ground of undue influence, even though at the time of such dealings the actual relation between them came to an end (u). And where a confidential relation is proved, it seems that the Court will presume its continuance unless it is clearly shown to have ceased (x).

The onus in all these cases is on the purchaser or mortgagee to show that the grantor had proper independent professional advice, and was not misled by any contrivance or false representation or suggestion (y). But where the father's solicitor professionally acted on behalf of the children, the mortgagee was not fixed by the notice of undue influence (z).

Independent professional advice is not necessary when the fiduciary relation has completely ceased to exist (a).

It has been held, in the case of a voluntary gift (b), and it is also concerned that the same principle would apply to a mortgage, the terms of which are exorbitant, that the Court will not set aside the transaction where the parties are strangers, not standing in any confidential relation to each other, unless undue influence, misrepresentation, or other actual fraud is shown, and in such cases the burden of proving undue influence or fraud lies on the person seeking to avoid the transaction (c).

But a security for a debt or advance is liable to be set aside on the ground of undue influence, where such influence is exercised not directly by a stranger who advances the money, but through the debtor or borrower, between whom and the person giving the security a confidential relation subsists. So where a son, who had recently come of age, at his father's instigation and without independent professional advice, joined with his father in a mortgage to secure debts due from the father, it

(t) *Aylward v Kearney*, 2 Ba & Be 463, *Hatch v Hatch*, 9 Ves 292.

(u) *Hyllon v Hyllon*, 2 Ves Sen 547, *Maitland v Irving*, 15 Sim 437.

(x) See *Rhodes v Bate*, L R 1 Ch A 252.

(y) *Baker v Bradley*, 7 De G M & G 597.

(z) *Bainbrigge v Browne*, 18 Ch D

188. See *O'Rourke v Bolingbroke*, App Cas 814.

(a) *Mitchell v Homfray*, 8 Q B 587, C A, commenting on *Rhodes v Bate*, L R 1 Ch A 252.

(b) *Villers v Beaumont*, 1 V 100.

(c) *Hunter v Atkins*, 3 My & K 113, *Toker v Toker*, 31 Beav 1, *Armstrong v Armstrong*, L R 8 E

held that the mortgage was void as obtained by undue influence (*d*) So securities given by a niece for debts due from her uncle, who had been her guardian, were set aside (*e*) So, also, where a debtor induced a lady, to whom he was engaged to be married, to give a security for his debt (*f*).

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An assignee for value of a security, with notice that it was obtained by undue influence, will be in no better position than the original mortgagee (*g*) But a security, though originally so obtained, will not be set aside as against a *bond fide* assignee without notice (*h*).

Assignee of mortgage obtained by undue influence

In cases of undue influence generally, where the transaction takes the form of a sale, the conveyance will be directed to stand as a security for the amount actually found due, with interest on the footing of a mortgage (*i*), and, it is said, even with costs (*l*), but the costs are in the discretion of the Court (*l*), and in case of refusal on tender of a proper sum, the mortgagee will be fixed with costs (*m*), as also where there has been fraud, or misrepresentation, or other misconduct (*n*), in which case the security will be set aside unconditionally. But in general the defendant will be put in the same position as if the transaction had not taken place (*o*). The plaintiff in such a suit will be made to pay the costs occasioned by charges of fraud which he does not substantiate (*p*).

Sale turned into mortgage

ii.—Mortgages to Solicitors by their Clients.—The question of undue influence has frequently been raised in cases of securities given to solicitors to secure advances made by them to their clients

Formerly a mortgage by his client to a solicitor for costs due and to become due was restricted to those actually due (*q*); but

Former rule as to securities for costs

(*d*) *Baker v Bradley*, 7 De G M & G 597, *Berdoo v Dawson*, 34 Beav 603, *Espey v Lake*, 10 Hare, 260, *Savery v King*, 5 H L C 627

(*e*) *Archer v Hudson*, 7 Beav 551, *Marland v Irving*, 15 Sim 437

(*f*) *Corbett v Brook*, 20 Beav 524

(*g*) *Bainbridge v Browne*, 18 Ch D 188, 197

(*h*) *Blackie v Clark*, 15 Beav 595

(*i*) *Peacock v Evans*, 16 Ves 512, *Davis v Duke of Marlborough*, 2 Swanst 139

(*k*) Sug V & P (14th ed.) p 286

(*l*) *Tyler v Yates*, L R 11 Eq 265

(*m*) *Tottenham v Emmet*, 11 L T N S 404, *S C*, 12 L T N S 838, *Nevill v Snelling*, 15 Ch D 679

(*n*) *Kay v Smith*, 7 H L C 750, *Thomas v Lloyd*, 3 Jur N S 288, *Tottenham v Green*, 32 L J Ch 201

(*o*) *Savery v King*, 5 H L C 627

(*p*) *Edwards v Burt*, 2 De G M & G 65, *St Albyn v Harding*, 27 Beav 11, *Foster v Roberts*, 29 Beav 471

(*q*) *Williams v Piggott*, Jac 598, *Pitchey v Rugby*, 9 Pri 79, *Re Moss*, 17 Beav 346 And see *Re Foster*, 6 Jur N S 687, L JJ See as to accounts between solicitor-mortgagees and client-mortgagors, *post*, p 1143

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there was no objection to a security given to a solicitor for a debt really due, or for a reasonable reward for services rendered (r). Nor was it unfair for a solicitor to stipulate, on procuring money for his client on mortgage, that the security should cover the balance which should be found due to him on a settlement of accounts (r). And with respect to the rule as to future costs, a distinction was drawn as to those cases where the client, being a trustee, stipulated that the attorney should not make demand upon him personally, and agreed with him that, when funds were in hand, he should be paid thereout such claim as he might have a right to make (s).

Present rule.

But now a solicitor may take security for his future costs, charges, and disbursements to be ascertained by taxation, or otherwise (t), which may now include profit costs of, and incident to the mortgage (u).

Charges made by a solicitor, though secured by mortgage, have long been open to taxation (v). And a mortgagor may, under 6 & 7 Vict. c. 73, obtain an order for taxation at any time before payment, or, under special circumstances, even after payment (y); but, under such circumstances, a strong case must be made against the solicitor (z).

A solicitor who has a mortgage for his costs may commence an action of foreclosure without having first had his bill of costs taxed, notwithstanding sect. 37 of the Act (a).

A solicitor cannot enforce a charge on his client's estate pending the taxation of the costs (b).

Security on subject-matter of suit

A security given by a client to his solicitor upon the subject-matter of the suit is valid, as it is likely to be beneficial to the client (c).

A sale, however, by the client to his solicitor of such subject-matter is void for champerty or maintenance (d), and will only stand as a security for the money actually advanced (e).

(r) *Cheslyn v Dalby*, 2 Y & C Exch 170, *Blagrove v Routh*, 3 Jur N S 399, L JJ, *Pearson v Benson*, 28 Beav 598.

(s) *Per Wigram, V-C*, in *Parsons v Spooner*, 5 Ha 111.

(t) 33 Vict c 28, s 16, 44 & 45 Vict c 44, s 5.

(u) 58 & 59 Vict c 25, post, p 1194.

(v) *Walsley v Booth*, 2 Aik 27, *Newman v Payne*, 4 Bro C O 350, *Morgan v Lewes*, 4 Dow, 29.

(y) *Re Carew*, 8 Beav 150. See *Re Sutton*, 11 Q. B. D 377.

(z) *Horlock v Smith*, 2 My & Cr 510. See *Waters v Taylor*, 2 My & Cr 526, *Wagge v Denham*, 2 Y & C Exch 117.

(a) *Thomas v Cross*, 10 Jur N S 1163.

(b) *Waugh v Waddell*, 16 Beav 521.

(c) *Anderson v Radcliffe*, E B & E 816, *Wood v Downes*, 18 Ves 120 *.

(d) *Simpson v Lamb*, 7 E & B 84.

(e) *Wood v Downes, sup*. See *Lewis v Hillman*, 3 H L C 607, *James v Kerr*, 40 Ch. D 449.

All securities from clients to their solicitors, and, in fact, all their dealings, are regarded with jealousy, as the relation between them gives such room for the exercise of undue influence, and may be so easily abused that they are not allowed to deal upon the same footing as other persons (*f*). CHAP XXXIII
Dealings with clients regarded with jealousy

In all such dealings the solicitor must show that he has taken no advantage, but has given his client every information, advice, and protection as if the client had been dealing with a stranger, and in default thereof a purchase will be treated as a security for the amount actually due (*g*).

The transaction will be set aside after many years, and after the deaths of the parties, if the facts have been concealed or misrepresented so as not to have been known to the client (*h*). Though lapse of time always forms an ingredient in these cases, less weight will be attached to it, whilst the relation between the parties still continues (*i*). Dealings set aside after lapse of time

The rules in regard to securities by clients are strict; the debt secured must, before the statute, have been actually due, and the onus of ascertaining the amount falls on the solicitor. There must be no unusual provisions in the security which will prejudice the client (*k*); and if any advantage is given to the solicitor as interest upon costs, full information must have been furnished to the client of his rights (*l*). Unusual provisions not allowed

If any unreasonable postponement of the time for redemption is inserted, the mortgagor will have the same rights as in an ordinary mortgage (*k*), and especially so if there has been any concealment or misrepresentation (*m*). Proviso for redemption

Where a mortgage by a client to his solicitor contained a power of sale to be exercised, although there was no default, and without the attention of the client being especially called to it, a sale was set aside, and the solicitor was fixed with the damages Power of sale

(*f*) *Walmsley v Booth*, 2 Atk 27
(*g*) *Cane v Allen*, 2 Dow, 289, *Gibson v Jeyes*, 6 Ves 266, *Welles v Middleton*, 1 Cox, 112, *Holman v Loynes*, 4 De G M & G 270, *Tomson v Judge*, 3 Drew 306, *Higgins v Joyce*, 2 J & L 282, *Gibbs v Daniel*, 4 Giff 1

(*h*) *Charter v Trevelyan*, 11 Cl & F 714, *Ward v Sharp*, 32 W R 584, W N (1884) 5

(*i*) *Gresley v Mousley*, 4 De G & J

96 See *Lyddon v Moss*, 4 De G & J 104 And see *Blagrove v Routh*, 3 Jur N S 399

(*k*) *Cowdry v Day*, 1 Giff 316, *Cockburn v Edwards*, 18 Ch D 449, C A, *Craddock v Rogers*, W. N. (1885) 134, C A

(*l*) *Lyddon v Moss*, 4 De G & J 104

(*m*) *Cowdry v Day*, *sup*, *Dunstan v Paterson*, 11 Jur 96, *Thomas v Lloyd*, 3 Jur N S 288.

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and costs, the damages including the difference between solicitor and client and party and party costs (*n*).

Where, however, a client owed a sum to his solicitor, and, being pressed for payment, executed a charge to secure the debt containing a power for the solicitor to sell the property without notice if the money was not paid by a specified day, it was held that this was not an ordinary mortgage transaction, but an arrangement for giving time to the debtor, and accordingly, that a sale under the power could not be impeached, though the debtor had no independent advice, and it did not appear that the unusual form of the power was explained to him (*o*).

Obligation of solicitor to trustee of bankrupt client

The obligation of a solicitor in dealings with his client extends to cases where the solicitor of a bankrupt is dealing with the trustee in the client's bankruptcy (*p*).

Severance of relation of solicitor and client

A solicitor whose fiduciary relation towards his client has been put an end to is free from all obligations incident to the relation in subsequent dealings with his former client (*q*).

Security for gift to solicitor void

A gift or security for a gift to a solicitor by his client pending the relation is absolutely void (*r*), and no such gift can be supported unless the relation between the parties had been finally severed (*s*).

Grounds for setting aside mortgages of reversions

iii.—Dealings with Reversionary Interests—The Court, for the protection of expectant heirs, frequently grants relief against dealings with reversionary interests and expectancies, and the like, on the ground of fraud, and, in such cases, inadequacy of consideration is still a material element in raising a presumption of fraud.

Unconscionable bargains with young men will be set aside, though they have mere expectations from their relations, where the bargains are not understood by the borrower (*t*). But, though youth is treated as an important circumstance, relief may, in a proper case, be granted against an unconscionable bargain, though the mortgagor was a person of mature age (*u*), and, in such a case, a mortgage of an expectant or reversionary interest is liable to be set aside if its terms are unreasonable,

(*n*) *Coolburn v Edwards*, 18 Ch D 449, C A, *Craddock v Rogers*, 56 L J Ch 968

(*o*) *Pooley's Trustee v Whetham*, 33 Ch D 111, C A

(*p*) *Luddy's Trustee v Fearé*, 33 Ch D 500

(*q*) *Boswell v Coake*, 23 Ch D 302.

(*r*) *Newman v Payne*, 4 Bro. C.C 350

(*s*) *Morgan v Manett*, 6 Ch D 638

(*t*) *Nevill v Snelling*, 15 Ch D 679 See *Readdy v. Prendergast*, 56 L T 790

(*u*) *Earl of Portmore v. Taylor*, 4 Sim 182; *Davis v Duke of Marlborough*, 2 Swanst 139 at p 143

where the mortgagor is poor and ignorant, especially if he is without independent advice (*x*) And the same rule would apparently be applied even where the mortgaged interest is in possession (*y*) But in such cases a bargain will not be readily presumed to be unconscionable on account of inadequacy of consideration, unless it is clearly proved to be the result of fraud, surprise, or misrepresentation, or unless the inadequacy is so gross as of itself thereby to indicate fraud, so as to afford a ground for setting aside a mortgage (*z*) On the other hand, it has been held in several cases that it is not necessary for the mortgagor to prove that he was in actual penury at the time of the transaction (*a*)

This interference of the Court was at first limited to dealings with expectancies, or what is called *post obit* securities, which the Court has always regarded with a jealous eye; and unless the transaction has been a fair one, it has either restrained an action at law upon the securities (*b*), or set the bargain aside as unconscionable (*c*), or refused to carry it into execution, leaving the plaintiff to his remedy at law (*d*) The onus falls on the mortgagee to show that the bargain is provident (*e*) But where the bargain is a fair one, the Court will enforce an agreement which rests on a contingency, although the event has turned out favourable for the mortgagee or purchaser (*f*) And the debtor cannot invariably impeach the *post obit* security, though the money might have been raised on more moderate terms (*g*) Nor will the Court grant relief further than as against the penalty of a bond, where the debtor, after coming into possession, and being under no pressure, has chosen to confirm the bargain (*h*) It is

Interference
of Court
formerly
limited to
expectancies

(*x*) *Fry v Lane*, 40 Ch D 312 See *James v Keir*, 40 Ch D 449, *Rae v Joyce*, 29 L R Ir 500, C A

(*y*) *Fry v Lane*, *sup*, per Kay, J, at p 322

(*z*) *Gwynne v Heaton*, 1 Bro C C 8, *James v Morgan*, 1 Lev 111, *Stilwell v Wilkins*, Jac 280, *Rice v Gordon*, 11 Beav 265, *Haygarth v Wearing*, L R 12 Eq 320

(*a*) *Bromley v Smith*, 26 Beav 644, *Salter v Bradshaw*, 26 Beav 161, *St Aubyn v Harding*, 27 Beav 11, *Foster v Roberts*, 29 Beav 467, *Emmet v Tottenham*, 10 Jur N S 1090

(*b*) *Marsack v Reeves*, 6 Madd 108

(*c*) *Sir John Banwardston v Lingood*, 2 Atk 133, *Wiseman v Beake*, 2 Vern 121, *Earl of Ardglass v Muschamp*, 1 Vern. 237, *Wharton v May*, 5 Ves

27, *Curling v Marquis of Townsend*, 19 Ves 628 See *Earl of Aylesford v Morris*, L R 8 Ch A 484, *Beynon v Cool*, L R 10 Ch A 389

(*d*) *Johnson v Nott*, 1 Vern 271

(*e*) *Davis v Duke of Marlborough*, 2 Swanst. 139

(*f*) *Montimer v Copper*, 1 Bro C C 156, *Baker v Bent*, 1 R & My 224 But see *Pope v Roots*, 1 Bro P C 370

(*g*) *Curling v Marquis of Townsend*, 19 Ves 628, *Wharton v May*, 5 Ves 27

(*h*) *Loré Chesterfield v Janssen*, 2 Ves Sen 125 And see generally as to dealings with expectant heirs, the notes on this case in 1 Wh & Tud L C Eq pp 675 et seq, *Wharton v May*, 5 Ves 27.

CHAP XXXIII. also to be remarked that dealings with expectancies, though liable to be set aside on the ground of fraud, were not within the Statutes of Usury, on account of the risk of the principal (*h*).

Vested reversionary interests

The same principle of relief was extended to sales of vested reversionary interests (*i*). The doctrine not only includes the class who in a popular sense might be called "expectant heirs," but also all remaindermen and reversioners (*k*). Although a reversion which is expectant upon the failure of issue of a tenant for life is generally not capable of valuation (*l*), yet if such tenant for life be a female, who has been many years married without having issue, though not past the age of child bearing, it seems that the Court will, for the purposes of valuation, treat the interest expectant on her death without issue as a simple reversion (*m*).

Privity of father, &c

It was held in one case that although an expectant heir might be entitled to relief, he would lose such title if he acted in the matter with the privity of the father or other person standing *in loco parentis*, but in that case the heir had also, after repudiating the bargain, acted in such a manner as to alter the situation of the other party and his property (*n*). But the principle that the fact that dealings by an expectant heir are known to his father or other relative deprives the heir of his equity to relief is strongly dissented from by Lord St Leonards (*o*). And it may now be regarded as settled that such knowledge, though material as tending to rebut the presumption of fraud or extortion (*p*), will not of itself prevent relief from being given in a proper case (*q*).

Life interest

The interest of a tenant for life, whose estate is subject to annuities and to interest upon mortgages, is not a reversionary interest within the scope of these considerations (*r*).

How value ascertained

Although a party dealing with an expectant heir must before the Sale of Reversions Act (*s*) have shown that he gave a fair

(*h*) See note (*h*), *ante*, p 613

(*i*) 1 Sug V. & P 14th ed p 285

(*k*) *Per* Jessel, M R, in *Beynon v Cook*, L R 10 Ch A 391, n. See also *Tottenham v Emmet*, 11 L T N S 404, *Earl of Aylesford v Morris*, L R 8 Ch. A 484, 497

(*l*) *Baker v Bent*, 1 R. & M. 224

(*m*) *Davies v Cooper*, 5 M. & Cr 270. See *Lord v Jeffkins*, 35 Beav 7, *Beynon v Fitch*, 35 Beav 570

(*n*) *Hamlet v. King*, 3 Cl. & F. 218

(*o*) Sug V & P 11th ed p 316

(*p*) *O'Rourke v Bolingbroke*, 2 App Cas 814

(*q*) *Talbot v Starnforth*, 1 J & H 484, 502, *Savary v King*, 5 H L C. 627, *Earl of Aylesford v Morris*, L R 8 Ch A 492, *Miller v. Cook*, L R 10 Eq 641

(*r*) *Webster v Cook*, L R 2 Ch A 542, questioned, *Tyler v Yates*, L R 11 Eq 276

(*s*) *Infra*, p 615.

price for his *post obit* securities, such value, where a valuation is possible, was to be ascertained not by the tables of actuaries, but by the market price at the time of dealing, taking all the circumstances of health and age into account; and it was in the discretion of the Court to direct an inquiry if it had not sufficient information; and the case of *Gowland v De Faria* (t), if it laid down any rule that the value must be ascertained by the tables (which is, however, denied), was so far overruled (u).

Hence, a sale by auction of expectancies, or of securities thereon, was held good, that being evidence of the market price (x).

In estimating the value of a contingent reversionary interest, the Court may admit evidence to show how far such value is affected by the remoteness of the contingency (y). The adequacy of the consideration is a matter for the Court to decide in each case, having regard to the circumstances of the particular transaction (z).

By the Sale of Reversions Act (a), it is enacted that no purchase, made *bonâ fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue; and the word "purchase" shall include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired.

Sale of Reversions Act

The Act came into operation on January 1, 1868, and does not apply to any purchase concerning which any suit was then depending. It is in other respects retrospective.

The law regarding setting aside unfair and unconscionable bargains respecting reversionary interests remains the same as before the statute (b). The Act leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief. These changes of the law have in no degree

Effect of this Act

(t) *Supra*
(u) *Lord Aldborough v Trye*, 7 Cl & F 436. And see *Headen v. Boshier*, M'Cl & Y 89, *Potts v Curtis*, Y 543, *Baker v Bent*, 1 R & My 224
(x) *Shelley v Nash*, 3 Madd 232
(y) *Baker v Bent*, 1 R & My 224, *Daves v Cooper*, 5 My & Cr 270, *Boothby v Boothby*, 1 Mac & G 604
(z) See and compare *Nott v Hill*, 2

Ch. Ca. 121, *Edwards v Browne*, 2 Coll 100, *Edwards v Burt*, 2 De G M & G 62, *Foster v Roberts*, 29 Beav. 471, *Jones v Rocketts*, 31 Beav. 130
(a) 31 Vict c 4
(b) *Miller v Cook*, L. R. 10 Eq 646, *Tyler v Yates*, L. R. 6 Ch. A. 665, *Earl of Aylesford v Morris*, L. R. 8 Ch. A. 480, *Beynon v Cook*, L. R. 10 Ch. A. 392, *Nevill v Snelling*, *sup*

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whatever altered the *onus probandi* in those cases, which, according to the language of Lord Hardwicke (c), "raise from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable" (d).

The burden of proof will, however, apparently be shifted, so far as undervalue is concerned, if the value of the property has been stated by the mortgagor in his proposals (e).

In a case of setting aside for inadequacy of value a sale by a young man of a reversion, relief was refused, there being no fraud; but it was held by Lord Hatherley, that as a separate and independent adviser was not employed, the whole transaction must be opened (f).

Relief against
assignee, with
notice

Relief may be granted as against an assignee of a mortgage with notice of fraud affecting the original transaction (g).

Nature of
relief

The Court gives relief in cases of sales and mortgages of expectant and reversionary interests on the principle of redemption; the conveyance will stand as a security for principal and interest, and generally for costs also (h).

Mortgages of reversionary interests stand on the same principle as sales (i); and the mortgagee is only entitled to the sum advanced with interest and costs as mortgagee (h).

Interest

But compound interest is not given, however long the purchaser has been kept out of his money (l).

(c) In *Earl of Chesterfield v Janssen*, 2 Ves Sen 125, at p 157

(d) Per Lord Selborne in *Earl of Aylesford v Morris*, L R 8 Ch A 484, at p 490 See *Fry v Lane*, 40 Ch. D 312

(e) *Perfect v Lane*, 3 De G F & J 369

(f) *O'Rourke v Bolingbroke*, 2 App Cas 814

(g) *Addis v Campbell*, 4 Beav 401, *Savery v King*, 5 H L O 627, *Wright v Vanderplank*, 2 Jur N S 599,

(h) *Edwards v Browne*, 2 Coll 100, *Bawtree v Watson*, 3 My & K 339, 341, *Hulward v Gambel*, Taml 375 See Sug V & P 11th ed p 314, 14th ed p 277 But see *Belcher v Vandon*, 2 Coll 162

(i) *Benyon v Fitch*, 35 Beav 510, *Emmet v Tottenham*, 10 Jur N S 1090, *Bromley v Smith*, 26 Beav 644

(k) *Re Slater's Trust*, 11 Ch D 227, see *Boues v Heaps*, 3 V & B 117

(l) *Gowland v De Faria*, 17 Ves 20.

Costs, though they will generally be allowed, are in the discretion of the Court (*m*).

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Costs

Accounts between borrower and lender relating to *post-obit* bonds or mortgages of reversionary interests will not be treated as settled accounts (*n*).

Accounts

In a suit to set aside *post-obit* securities a receiver of the rents of the estate would not usually be granted, on the motion of the defendant, if the principal money and interest were paid into Court (*o*). But where the whole security possessed by the party making the motion was contingent on the life of the borrower, and the lender had been out of his money for twenty years, the Court granted a receiver, notwithstanding an offer on the part of the plaintiff to pay principal and interest into Court (*p*).

Receiver

A mortgagor may lose his right to relief against an unconscionable bargain by any act amounting to a formal confirmation of the transaction, as by executing a deed or will expressly or impliedly confirming the same (*q*), especially if in so doing he has acted under independent and competent advice (*r*). He may also lose his right by any act which so alters the relation of the parties as to render it impossible for him to restore the consideration with interest and costs. So where goods were sold to a person in distressed circumstances by a tradesman; he knew that they were bought merely with a view to raise money by selling them again, and the goods were resold accordingly, the Court refused to set aside securities given for the price (*s*). The right to relief may also be lost by acquiescence for a considerable length of time (*t*).

Ratification of transaction

But confirmation or acquiescence will not deprive a person of his right to relief if, at the time of confirmation, or during the period of acquiescence, the borrower continues to be under the same pecuniary distress or pressure which forced him to enter into the original transaction (*u*).

(*m*) *Tyler v Yates*, L R 11 Eq 265, see *Twissleton v Griffith*, 1 P Wms 310, *Bromley v Smith*, 26 Beav 644, 676, *Neville v Snelling*, 15 Ch D 679, *Fry v Lane*, 40 Ch D 312, *James v Kerr*, 40 Ch D 449

(*n*) *Croft v Graham*, 2 De G J & S 155, *Tottenham v Green*, 1 N R 466. See further as to accounts between mortgagees and mortgagors, *post*, Chap LIV pp 1137 *et seq*

(*o*) *Curling v Marquis of Townsend*, 19 Ves 628

(*p*) *Free v Hinde*, 2 Sim 7

(*q*) *Cole v Gibbons*, 3 P Wms 289, *Stump v Gabey*, 2 De G M & G 623

(*r*) *Lyddon v Moss*, 4 De G & J 104

(*s*) *King v Hamlet*, 3 Cl & F 218

(*t*) *Sibbering v Earl of Balcarras*, 3 De G & S 735, *Addis v Campbell*, 4 Beav 401, *Lord v Jeffkins*, 35 Beav. 7, *Turner v Collins*, L R 7 Ch A. 329. See *Gerrard v O'Reilly*, 3 Dr & War 414

(*u*) *Gowland v De Faria*, 17 Ves. 20, *Curwyn v Milner*, 3 P Wms.

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Statute of
Limitations.

The Statutes of Limitations will, in the case of a mortgage of a reversionary interest, begin to run only from the time when the interest falls into possession so as to preclude the borrower from seeking to set aside the mortgage (x).

292, n (where an obligee was compelled to refund money actually paid on a *post-obit* bond), *Mediscott v O'Donel*, 1 Ba & Be 156, *Kendall v Beckett*, 2 R. & My 88, *Edwards v*

Browne, 2 Coll 100, *Kempson v Ashbee*, L R 10 Ch A 15

(x) *Salter v Bradshaw*, 26 Beav 161
See *Beynon v Cook*, L. R. 10 Ch A 393.

CHAPTER XXXIV

OF MORTGAGES WHICH ARE VOID ON GROUNDS OF PUBLIC POLICY.

i.—Securities for Debts incurred in Gaming and Wagering.—By 9 Anne, c 14 the stat 9 Anne, c 14, s. 1, notes, bills, bonds, judgments, mortgages or other securities or conveyances for or in consideration of money lost or lent at play are made utterly void, and all mortgages and incumbrances or conveyances of lands made upon that consideration are made to enure to the use of the person next in remainder or succession, as if the mortgagor were then dead (a); and payments made on such securities could not be supported, and might have been recovered back in equity as incidental to the delivery up of such securities (b); and the forfeiture of such securities under the first section of the statute of Anne was held not to be a penalty of such a nature as to protect a party from discovering the consideration for the security on which the action at law was brought (c)

It was formerly considered that there was a distinction under this statute between money lent and money lost at play, and that, in the former case, the security was avoided, but the contract for payment was good; but it was subsequently decided that where the game was illegal, the contract for payment of money lent or lost at play was void, as well as the security, by the statute of Anne (d).

By 5 & 6 Will. IV. c 41, so much of the above Acts as 5 & 6 Will IV c 41 declares “notes, bills, or mortgages” to be void is repealed, and

(a) See *Smith v Bond*, 11 M & W 558

(b) *Fomb Eq*, Vol 1, Ch 4, s 6, and *Rawden v Shadwell*, Amb 269, *Smith v Bond*, *sup*, and sect 2 of the statute of Anne

(c) *Sloman v Kelly*, 4 Y & C C C 169, and 3 Y & C C C 673

(d) *M'Kinnell v Robinson*, 3 M & W 434. And see *Young v Moore*, 2 Wils K B 67, *Applegarth v Colley*, 10 M & W 723, 732, *Thorp v Coleman*, 1 C B 990

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the said Acts are made to operate as if they had enacted that every such "note, bill, or mortgage" should be deemed to have been made, drawn, accepted, given, or executed for an illegal consideration. The Act also repeals that part of the statute of Anne relative to incumbrances on land enuring to the benefit of the remainderman, &c., and enacts that the money paid by the drawer, &c. upon such "bill, note, or mortgage" to the indorsee, holder, or assignee thereof, shall be taken as paid to the use of the party to whom the security was originally given, and be recoverable from him by action at law (e).

This Act was passed for the relief of purchasers of such securities for valuable consideration without notice.

But even under the old law the Court would not set aside a judgment founded on a warrant of attorney, given to secure a gaming debt, as against a purchaser, if the debtor had represented before the purchase that the debt was a valid one (f).

It may be remarked that 5 & 6 Will. IV. c. 41 only alters the operation of the prior Act as to bills, notes, or mortgages. It has been decided that, as to judgments, the prior Act only avoids voluntary judgments given by the loser at play, either to the winner or to someone for his benefit, as a security for money lost, and do not avoid a judgment obtained adversely by an innocent party, or, as it seems, by the winner himself; but the defendant should set up the illegality of the security as an answer to the action (g).

Money lent to pay a gambling debt is not within the stat 5 & 6 Will. IV. c. 41 (h).

The stat. 8 & 9 Vict. c. 109, s. 18 (which repeals so much of the statute of Anne as was not repealed and re-enacted with alteration by the stat. 5 & 6 Will. IV. c. 41), enacts as follows —

"All contracts or agreements, whether by parol or writing, by way of gaming or wagering, shall be null and void, and no suit shall be brought or maintained at law or in equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or deposited in the hands of any person to abide the event on which any wager shall have been made, provided always, that this enactment shall not be deemed to apply to any subscrip-

(e) See *Gulpin v Clutterbuck*, 13 L. T. 71, 139, 159, Q. B.

(f) *Davison v Franklin*, 1 B. & Ad. 142.

(g) *Lane v. Chapman*, 11 A. & E.

966, *Chapman v Lane*, 11 A. & E. 980.

(h) *Aldenbrook v Hall*, 2 Wils. K. B. 309, *Barjeau v Walmsley*, 2 Stra. 1248, *Exp Pyke*, 8 Ch. D. 754, C. A.

tion or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money, to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise”

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The Act also (sect 17) makes a party who wins money, &c by way of fraud practised in gaming or wagering, punishable as obtaining money under false pretences.

It is enacted by the Gaming Act, 1892 (2), that—

55 & 56 Vict
c 9

“Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 8 & 9 Vict c 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.”

Promises to repay sums paid under contracts void by 8 & 9 Vict. c 109, to be null and void.

The Act has been applied so as to refuse any remedy to an agent who had paid money on express instructions from his principal, though it was not stated in the affidavits that the agent had any knowledge that the money was paid in respect of debts (k). The Act has been held not to be retrospective (l)

Effect of
this Act

The result seems to be as follows.—

That any gaming or wagering contract, agreement, or promise is now clearly void, and cannot be enforced :

That the securities given for money won by any gaming or wagering, or for repayment of moneys paid by another person on behalf of and at the request of a loser (or at least, bills, notes, and mortgages given as such securities), though now no longer totally void, can be enforced by a transferee for valuable consideration without notice, and by no other person (m) :

That if voluntary judgments and securities other than “bills; notes, and mortgages” be untouched by the statute of Will. IV yet it would seem that the statute of Victoria would be a bar to their being enforced independently of the ordinary doctrines of law and equity; and in such case a purchaser for valuable consideration, holding such judgment or security, would seem not to be protected :

(2) 55 & 56 Vict c 9

(k) *Tatam v Reeve*, (1893) 1 Q B.

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(l) *Knight v Lee*, (1893) 1 Q B 41

(m) See the preamble of the Act of Will IV, which seems to warrant this

assertion, and also to bring other securities besides bills, notes, and mortgages within the scope of the Act. See *Hawker v Hallewell*, 2 Sm. & G 194, affirmed on other grounds, 2 Jur N S 794

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That judgments recovered adversely against the loser remain as before the late Acts:

That gaming securities may be set aside and ordered to be delivered up (*n*)

That at common law money paid by the loser to the winner can only be recovered back while the contract is executory (*o*)

That probably the Court still could, on setting aside gaming securities, decree money paid on them to be repaid (*p*) The ground, however, on which *Rawden v. Shadwell* (*q*) was decided, viz, that the security was totally void by the statute, is now gone; and it must be observed that, in that case, only part of the money secured had been paid:

That money paid to the transferee of gaming securities, or, at least, of a bill, note, or mortgage, for valuable consideration without notice, is recoverable from the party to whom the security was originally given, as money paid for his use (*r*)

The distinction between these cases and those in which the transaction is illegal and subject to penalties is obvious (*s*)

Deposit with stakeholder.

But it would seem that money deposited with a stakeholder cannot now, on the ground of playing for ready money, be recovered by the winner (*t*); though it seems that any one of the depositors who has repudiated the wager before the time fixed for its determination, or even before the money is paid over, may recover back the sum deposited by him from the stakeholder, as fully as he could before the Act (*u*).

Deposit of securities as cover for dealings in stocks and shares.

Where an action was brought to recover back securities deposited as cover for differences which might arise on dealings in stocks and shares which were found by the jury to have been gambling transactions, it was held that sect 18 of the stat 8 & 9 Vict c. 109 did not apply to such a deposit so as to prevent the depositor from maintaining his action, and that he was entitled to delivery up of the securities The case was treated by Lord Esher, M. R., and Sir A. L. Smith, L. J., as one

(*n*) See *Rawden v. Shadwell*, Amb 269, *Wynne v. Callander*, 1 Russ. 293 See Story's Eq Jur s 303

(*o*) See *Hastelow v. Jackson*, 8 B & Cr 225

(*p*) See *Rawden v. Shadwell*, *sup* But see the judgment of Lord Talbot, in *Bosanquet v. Dashwood*, Cas t Talb (Williams), 38

(*q*) Amb 269.

(*r*) 5 & 6 Will IV. c. 41, *Galpin v. Outterbuck*, 13 L. T. 71, 139, 159, Q B; *Jessopp v. Lutyche*, 10 Exch.

614, *Rosewaine v. Bulling*, 15 C B N S 316, *Fitch v. Jones*, 5 E & B 238.

(*s*) *Fisher v. Bridges*, 3 E & B 642.

(*t*) See *Applegarth v. Colley*, 10 M & W 723, *Conney v. Plummer*, (1897) 1 Q B 634, C A.

(*u*) *Varney v. Hickman*, 5 C B 271, 17 L J C P 102 And see *Hastelow v. Jackson*, 8 B & Cr 225, *Hodson v. Terrill*, 1 Cr & M 797, *Gatty v. Field*, 9 Q B. 431.

of trover or detinue; but Rigby, L J, regarded it rather as one of a claim to redeem, and said that the transactions having been held to be gaming transactions there was nothing due upon the security, and accordingly that the mortgagee must deliver up the securities, or, if they could not be given up, he must pay their value (x)

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It seems that the effect of the proviso at the end of sect 18 of the stat. of Victoria is to render valid, or rather to save out of the operation of the former part of the clause, any subscription or contribution to abide the event of a lawful game, though the subscribers themselves are the parties engaged in the game, and that the winner may recover the money so subscribed or agreed to be subscribed (y); and thus, where a foot race or horse race takes place between two or more parties, each of whom deposits a sum with a stakeholder, such deposit may be recovered by the winner; and yet, by a strange anomaly, the security given for such money may be illegal, and money paid on such security may, perhaps, be recovered back under the statutes of Anne and Will IV. (y)

Subscriptions
to prizes

In *Applegarth v. Colley* (z), before the statute of Victoria, a horse race for money, raised by the parties themselves, was said to be within the statute of Anne; but it was said that, since the repeal of 13 Geo. II. c 19, by 3 & 4 Vict. c. 5, there was nothing to prevent a race for a sum of money given by a stranger by way of prize.

Horse racing

Horse racing was, by 13 Geo. II c 19, declared to be illegal, unless the stake was 50*l.* at least, or the race was held in certain places named in the Act. But wagers even on such legal races were illegal, at least if exceeding 10*l.* (a), and, it seems, are void in all cases, since 8 & 9 Vict c 109, s 18.

Where judgment has been obtained in an action on the contract, in which the illegality within the above statutes was not set up, it cannot be impeached (b).

By 18 Geo II c 34, courts of equity were empowered to make a decree in suits to enforce payment under transactions contrary to 9 Anne, c. 14, and in several cases have accordingly given relief by ordering the delivery up of securities (c).

(x) *Strachan v Universal Stock Exchange*, (1895) 2 Q B 329, C A.

(y) *Batty v Marrott*, 5 C B 818, 17 L J C P 215

(z) 10 M & W 723

(a) *Goodbun v Manley*, 2 Stra 1159,

Shillito v Theed, 7 Bing 405, *Pugh v Jenkins*, 1 Q B 631, *Greville v Chapman*, 8 Jur 190, Q B

(b) *Lane v Chapman*, 11 A. & E 966, 980

(c) *Newman v Franco*, 2 Anst 519,

CHAP XXXIV

9 Anne, c. 14, enacted (*d*) that persons liable to be sued for money or valuables under the statute should be compelled to give discovery (*e*). The repeal by 8 & 9 Vict c 109 of the Act of Anne, and of that part of the Act of Geo II which relates to it, appears to leave the matter subject to the general rules of courts of equity, concerning answers which would expose a defendant to criminal prosecution.

If a loan be placed by the lender in the hands of the borrower as the lawful owner of it to dispose of as he pleases, a security for its repayment will be good, although the lender may have expected to be paid out of it the amount of bets won by him from the borrower; but if it were lent under an agreement that the bets should be paid out of it, the security will be bad as a colourable evasion of 9 Anne, c 14, and 5 & 6 Will IV c 41 (*f*).

A bond to secure moneys agreed to be paid to avoid being posted as a defaulter for non-payment of racing debts, is good (*g*).

Stock-jobbing transactions

The enactments in restraint of stock-jobbing have been abrogated (*h*), and, accordingly, securities given for moneys payable in respect of such transactions are no longer impeachable on the ground of illegality of the consideration, unless such transactions are in fact gambling transactions (*i*).

Consideration of future cohabitation

ii.—Immoral Securities.—Securities given for an immoral consideration are void; as where a mortgage or annuity is given to a woman in consideration of future illicit intercourse with the grantor (*k*); in a case of this kind the Court ordered the bond to be delivered up, and set aside a judgment and other proceedings upon it (*l*).

Consideration of past cohabitation

A distinction, however, is made where the security is given as *premium pudicitiae* in consideration of a cohabitation which has determined, which has been said to be a "lawful and conscien-

Andrews v Berry, 3 Anst 634, *Rawden v Shadwell*, Amb 269, *Wynne v Callander*, 1 Russ 293, *Parler v Alcock*, 10 B & C 361.

(*d*) Sect 3.

(*e*) *Earl Lichfield v Bond*, 6 Beav 88.

(*f*) *Hill v Fox*, 4 H & N 359.

(*g*) *Bubb v Yelverton*, L. R. 9 Eq 471. And see, as to the legality of such a debt in other respects, *Johnson v Lasley*, 12 C. B 468.

(*h*) 23 Vict c. 28.

(*i*) *Supra*.

(*k*) *Robinson v Cox*, 9 Mod 263, *Walker v Perkins*, 1 W Bl 517, *Gray v Mathias*, 5 Ves 286, *Friend v Harrison*, 2 C & P 584, *Rea v Northwingsfield*, 1 B & Ad 912, *Batty v Chester*, 5 Beav 103, *Smythe v Griffin*, 13 Sim 245, *Evans v Carrington*, 30 L J Ch 370, *Bullmore v Williams*, 32 Beav 574.

(*l*) *James v Hoskins*, 1 Tidd Pr 593.

tious" consideration (*m*), on the ground that such a course enables the woman to lead a course of life more conducive to her own happiness and to public morality

CHAP XXXIV.

It is now settled, after some difference of opinion (*n*), that the Court will not relieve against a security given in consideration of past cohabitation, even though the defendant is proved to be a common prostitute (*o*)

Consideration of past cohabitation

If, however, the consideration be a past cohabitation with a married man, equity will not assist the woman to enforce the security, if she knew that the defendant was a married man (*p*); but if there are children, the Court will regard their interests (*q*); and in such a case the Court will enforce a security for payment of money as a provision for the woman and her children

Cohabitation with married man

It must be borne in mind that the consideration of past cohabitation, though meritorious, is not valuable (*r*), and accordingly will not support a security for payment of money unless the instrument creating the security is under seal and executed (*s*), for in matters executory, even on the consideration of *premium pudicitiae*, the Court will not compel the party or his executors to fulfil an agreement to provide for a forsaken mistress

Security must be by deed.

Where a security is given by a man to his mistress in consideration of past cohabitation, the continuance of the cohabitation is not of itself sufficient to raise the presumption that the security is given in consideration of a continuance of the connection (*t*). No *turpis contractus* shall be presumed unless proved (*u*)

Continuance of cohabitation

If the instrument creating a security given in consideration of past cohabitation is lost or destroyed, it would seem that the grantee may have her remedy in equity notwithstanding (*x*); but "these matters are discretionary" (*y*), and there are some old cases to the contrary (*z*)

Loss of deed creating security

(*m*) *Turner v Vaughan*, 2 Wils K B 339

(*n*) *Whaley v Norton*, 1 Vern 484

(*o*) *Hill v Spencer*, Ambl 641

(*p*) *Priest v Parrot*, 2 Ves Sen 160

(*q*) *Knye v Moore*, 1 S & St 61

(*r*) *Beaumont v Reeve*, 10 Jur 284, Q B, *Bunnington v Wallis*, 4 B & Ald 650 *Gibson v Dockie*, 3 M & S 463, is not law

(*s*) *Matthews v L—*, 1 Madd 558, *Whaley v Norton*, 1 Vern 483

(*t*) *Re Vallance, Vallance v Blagden*, 26 Ch D 353

(*u*) *Lightbone v Weedesh*, 1 Eq Ca Ab 24, pl 7, 93, pl 5

(*x*) *Underwood v. Stoney*, 1 Ch Ca 78, *Lightbone v Weedesh, sup.*

(*y*) 1 Eq Ca Ab 62, pl 4

(*z*) *Miller v Beames*, 1 Roll Abr 375, *Chancery (Q)*, pl 1, *Vincent v Beverlye*, Noy, 82 See *Toulmin v Price*, 5 Ves 235

CHAP XXXIV

Marriage
brocage

iii.—Other Invalid Securities — Securities given as a reward for procurement of marriage (commonly called marriage brocage) with a particular person are also void as contrary to that freedom of choice in marriage which is encouraged by public policy. Such securities may be ordered to be delivered up, and sums already paid under them to be returned (*a*)

Securities for
obtaining sale
of public
office

Upon the same principle of public policy, securities given for obtaining or for procuring the sale of a public office of trust are void, whether the office be or be not one the sale of which is forbidden by statute (*b*).

Compound-
ing felony

Where the security is the result of an illegal agreement to compound a felony it will be void (*c*); but a security given for a debt actually owing will not be avoided merely because it appears that the creditor was thereby induced to abstain from prosecution (*d*).

A deposit by a married woman of securities held to her separate use to cover a loss occasioned to the plaintiff by the felony of her husband, upon condition of the charge being withdrawn, is illegal (*e*)

(*a*) *Drury v Hoole*, 1 Vern 411, *Striblehill v. Brett*, 2 Vern 445, *Smith v Bruning*, 2 Vern 392 See *Smith v Aykwell*, 3 Atk 566, and *Shurley v Martin*, 3 P Wms 74, n, per Lord Hardwicke, *Cole v Gibson*, 1 Ves Sen 506, *Hall v Potter*, 3 P Wms 392, n

(*b*) *Law v Law*, 3 P Wms 391, *Stackpole v Earle*, 2 Wils K B 133

(*c*) *Ward v Lloyd*, 6 M & Gr 785

(*d*) *Flower v Sadler*, 10 Q B D 572, C A See *Williams v Bayley*, L R 1 H L 200, *Seear v Cohen*, 45 L T 589, Q B

(*e*) *Whitmore v Farley*, W N (1881) 8

Part V.

OF THE ESTATE, RIGHTS, LIABILITIES, AND REMEDIES OF
THE MORTGAGOR AND PERSONS CLAIMING UNDER HIM.

CHAPTER XXXV

OF THE NATURE AND INCIDENTS OF AN EQUITY OF
REDEMPTION.

i.—Equity of Redemption is an Estate.—It has been already shown that, by the common law, the legal ownership of the land, on the execution of the deed of mortgage, is transferred to the mortgagee, subject to be divested on performance of the condition, and that a mere right of re-entry on performance of the condition remains in the mortgagor, of which, being neither alienable nor devisable prior to the modern statutes (*a*), advantage might be taken only by him or his heirs

Mortgagor had at common law no estate, but only a right of re-entry

In an early case (*b*), these doctrines were applied in equity to the right to redeem after condition broken, and it was there held that an equity of redemption was a mere right, and was not an estate of inheritance capable of being entailed under the statute *De Donis* (*c*).

Application of this doctrine in equity

In the leading case of *Casborne v Scarfe* (*d*), however, Lord Hardwicke, C, stated the settled rule of equity to be that an equity of redemption is to be deemed an estate in the land, for that it may be devised, granted, or entailed with remainders, and such entail and remainders might be barred by fine or recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin. The person, therefore, entitled to the equity of redemption is considered as owner of the land.

Equity of redemption held to be an estate in the mortgagors

It is now an established doctrine of equity that the mort-

(*a*) See 1 Vict c 26, s 3, and 8 & 9 Vict c 106, s 6, by which rights of entry are made devisable and alienable by deed

(*b*) *Roscarrock v Barton*, 1 Ch Ca 217
(*c*) 13 Edw I c. 1
(*d*) 1 Atk 602

CHAP XXXV

gagor is, until foreclosure, the real owner of the property, and possessed of it in right of his ancient and original estate (e).

ii.—Personal Rights and Privileges of Mortgagor.—With whatever strictness the common law may have originally regarded the breach of the condition by the mortgagor, yet, in modern times, the doctrine of the courts of equity, recognizing the mortgagor (until foreclosure) to be the actual owner of the land, has to a certain extent, with reference to the possession by the mortgagor, been acted upon as well by the courts of common law as by the legislature.

Vote for
Parliament

The statute law (f) has provided that the mortgagor in possession shall have the privilege of voting for the return of members of Parliament notwithstanding the mortgage. If, however, the interest on the mortgage reduces the annual value below 40s, the mortgagor has no vote (g); but nothing but interest can be deducted (h). The monthly payments, however, secured by mortgage to trustees of a benefit building society under 6 & 7 Will IV. c 32, are a charge on the estate which will destroy the owner's right to vote if they do not leave him the requisite quantity of interest prescribed by statute (i).

Holding
courts
Nomination
to benefice

He has the right of holding courts where lord of a manor (k).

A further privilege annexed to the estate of the mortgagor is the right, where an advowson is the subject of the mortgage, of nominating to the church on an avoidance of the living (l).

Director's
qualification
not lost by
mortgage of
shares
Poor law
settlement

Though by the articles a director of a company must be a registered member in his own right (m), he does not lose his qualification by a mortgage of his shares (n).

At common law the title of ownership of a mortgagor while in possession is so far recognized as to gain him a settlement under the poor laws (o), but for this purpose he must reside within ten miles of the property (p), and be in possession in his capacity

(e) See *per* Lord Selborne in *Heath v Pugh*, 6 Q B D 345, at p 360, and *per* Kekewich, J, in *Tarn v Turner*, 39 Ch D 456, at p 460.

(f) 8 Hen VI c 7, 2 & 3 Will IV c 45, s 23, and 6 & 7 Vict c 18, s 74.

(g) *Bedfordshire*, 2 Lud 469, *Mid-
dlesex*, 2 Peckw 103, *Lee v Hutchin-
son*, 8 C. B. 18, 2 Lutw Reg. Ca.
159.

(h) *Rolleston v. Cope*, L. R. 6 C. P.
292.

(i) *Copland*, app, *Bartlett*, resp, 6 C
B. 18.

(k) *Ante*, p 168.

(l) *Joy v Cox*, Prec Ch 71, *Amhurst v Davling*, 2 Vern 401, *Gally v Selby*, Stra 403, *Mackenzie v Robinson*, 3 Atk 559, which overruled *Gardner v Griffith*, 2 P Wms 403. And see *ante*, p 169.

(m) *Exp Littledale*, 6 De G M & G 714.

(n) *Pulbrook v Richmond, & Co*, 9 Ch D 610, *Cumming v Prescott*, 2 Y & C Ex 488.

(o) *Rex v Inh of Catherington*, 3 T. R. 771.

(p) 4 & 5 Will IV c 76, s 68, a.

as mortgagor, and not by fraud or wrong; and in a case (*g*) in which a mortgagee of several messuages having recovered in ejectment, afterwards permitted the mortgagor to inhabit one of the houses for a particular purpose, *i e*, the overlooking of some repairs, the Court of King's Bench held that no settlement was gained by such latter residence, for he was not in possession as mortgagor. And in another case (*r*), in which an estate had been conveyed to trustees, upon trust to sell for payment of debts and to pay the residue to the grantor, the grantor before sale got fraudulently into possession, and it was held that he did not, by such residence, gain a settlement.

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iii.—Right of Mortgagor to bring or defend Actions with regard to the Mortgaged Property.—By the Judicature Act, 1873 (*s*), s 25, it is enacted as follows:—

Right to bring and defend actions

“(5) A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.”

Suits for possession of land by mortgagors

The mortgagor may defend actions relating to the land or other property subject to the mortgage as against persons other than the mortgagee (*t*)

As a general rule, where an action is brought by or against a person having only an equitable interest in property which is the subject-matter of the action, the person in whom the legal estate is vested must be made a party thereto, so as to bind the legal estate, and to prevent the owner of it from molesting the party against whom relief is sought by further proceedings (*u*). So, the mortgagee must be made a party if his interests are in any way likely to be prejudiced by the result of an action brought by or against the mortgagor. Thus, if the action is for recovery of land subject to a mortgage, the mortgagee in whom the legal estate is vested must be made a party (*v*). So, also, if the matter in dispute involves the taking of accounts, he must be a party, so as to bind him by the accounts (*w*).

When the mortgagee must be party to actions respecting equity of redemption

(*g*) *Reaz v Inhabitants of Catherington*, 3 T R 771

(*r*) *Reaz v Inhabitants of St Michael's*, 2 Doug 630

(*s*) 36 & 37 Vict c 66

(*t*) *Selrick v Smith*, 11 Moo 459

(*u*) Dan Ch Pr vol 1 p 202 See

Hobson v Stanier, 9 Mod. 80, *Wood v Williams*, 4 Madd 186, *Hickens v.*

Kelly, 2 Sm & G 264

(*v*) *Allen v Woods*, 68 L T 143

(*w*) *Van Gelder, Apsimon & Co v*

Sowerby Bridge, &c Soc, 44 Ch. D. 374, at p 392, C A.

CHAP XXXV

When the mortgagee need not be a party

But if the relief sought in no way prejudices or affects the mortgagee's interest, he need not be made a party to an action by or against the mortgagor. So, a mortgagor in receipt of the rents and profits of land has been held to be entitled to maintain an action for an injunction to restrain an injury done to the mortgaged property without making the mortgagee a party (*y*). And where a registered owner of a patent which was subject to a mortgage brought an action claiming an injunction and damages for infringement, it was held that he might maintain his action without making the mortgagee a party, but without prejudice to any application by the defendant to have the mortgagee made a party, if circumstances should render it necessary to do so (*z*). So, also, a mortgagor may enforce specific performance of an agreement relating to the mortgaged property, without making the mortgagee a party, if the interests of the latter will not be affected by the decision of the matter in dispute (*a*).

Adding parties

No person can be added as a plaintiff in any cause or matter without his own consent in writing thereto (*b*). If a mortgagee is a necessary party to an action, and declines to be joined as plaintiff, the Court will order him to be added as defendant (*c*).

Whether mortgagor must offer to redeem

If the mortgagor brings an action relating to the mortgaged property, and finds it necessary to make the mortgagee a party in order that the relief sought may bind the interest of the latter, the mortgagor must offer to redeem (*d*).

Multifarious actions by mortgagor

If a mortgagor brings an action in which he mixes up several distinct matters, in some of which the mortgagee has no concern, so that he is not a necessary party in regard to them, even an offer to redeem will not be sufficient. Formerly, in such a case, the bill would have been demurrable by the mortgagee for multifariousness (*e*); and under the present practice the mortgagee may have the action dismissed as against him with costs, and the Court may order the pleadings, so far as they affect him, to be struck out (*f*), or may order a separate action to be brought (*g*).

Action in name of mortgagee

Independently of sect 25 (5) of the Judicature Act, 1873 (*h*), a mortgagor, indemnifying the mortgagee in respect of costs, is

(*y*) *Faulclough v. Marshall*, 4 Ex D 37

(*z*) *Van Gelder, Apson & Co v Sowerby Bridge, &c Soc*, 44 Ch D 374, C A

(*a*) *Franklyn v. Fern*, Barn Ch R 30, 32, *Tasker v Small*, 3 My. & Cr. 63. *Sanders v Richards*, 2 Coll. 568. And see *Ford v Tennant*, 3 De G F & J 695

(*b*) R. S. C. Ord XVI. r 11.

(*c*) *Van Gelder, Apson & Co v Sowerby Bridge, &c Soc*, 44 Ch D 374, at p 394, C A

(*d*) *Hughes v Cook*, 34 Beav 407.

(*e*) *Pearse v Hewitt*, 7 Sum 471

(*f*) R. S. C., Ord XIX r 27

(*g*) *United Telephone, &c Co v Tasker*, 59 L T 852

(*h*) *Supra*, p 629.

entitled, if necessary, to take proceedings in the name of the mortgagee to recover or protect the mortgaged property (i)

CHAP XXXV

If the subject-matter of an action is a disputed claim of right or title to property, and a party, whether plaintiff or defendant, mortgages his interest *pendente lite*, the question will arise whether the mortgagee is a necessary or proper party to the action.

Whether assignee *pendente lite* is a necessary party

The registration of a *lis pendens* relating to land will affect a mortgagee with notice of the claim which is the subject of the action (j), and bind him by its result accordingly, provided the plaintiff has, previously to the mortgage, sufficiently indicated the real estate sought to be charged in the action (k); and accordingly such a mortgagee need not be made a party, even though the plaintiff is aware of the mortgage

Notice of *lis pendens*

The doctrine of *lis pendens* is confined to real estate and leaseholds, and has no application to goods and chattels (l).

Prior to the stat 2 & 3 Vict. c 11, requiring registration of *lis pendens*, the general rule was that assignees *pendente lite* were not necessary or proper parties to an action claiming right or title to property. It was said that such assignments were void or voidable (m), but the true meaning of this proposition appears to be that such an assignment was inoperative to vary the rights of the parties in that action as between themselves, and consequently that the assignee, though not a party, would be bound by a judgment adverse to his assignor, and so may wholly or in part lose the benefit of his assignment; otherwise, suits would be undeterminable if one party, pending the suit, could, by conveying to others, create a necessity for introducing new parties; if, however, the effect of the judgment should be to affirm the right or interest assigned, the assignment would be good as between the assignee and his assignor (n). The rule applied whether the assignor be plaintiff or defendant (o)

Assignees *pendente lite* not generally necessary parties.

If, however, the absence of the assignee would have prejudiced rights or interests of other parties to the action, it was proper to make him a party, as, for instance, if the legal estate had been conveyed to him (p); or if the title deeds have been handed over

Exception where legal estate vested in him, &c

(i) *Phene v Gullan*, 5 Ha. 1

(j) See further as to notice by registration of *lis pendens*, *post*, p 1330

(k) *Price v Price*, 35 Ch D 297

(l) *Wigram v. Buckley*, (1894) 3 Ch 483, C A

(m) *Dan Ch Pr* 266 See *Walker v Smallwood*, Amb 677, *Gaskell v. Dundin*, 2 Ba & Be 167

(n) *Per Sir T Plumer*, V-C, in

Metcalfe v Pulvertoft, 2 V & B 200, at p 205 See *Mead v Lord Orreney*, 3 Atk 243, *Worseley v Lord Scarborough*, 3 Atk 392, *Bellamy v Sabine*, 1 De G & J 566, 585

(o) *Bades v Harris*, 1 Y & C C C 233, *Patch v Ward*, L R 3 Ch A 203

(p) *Daly v Kelly*, 4 Dow, 435 See *Bp of Winchester v Furne*, 11 Ves, 197.

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Exception as
to matters of
account, &c

to him; or if other incidental or consequential relief is asked for requiring something to be done by the assignee (*q*)

Again, if no right or title to the property, which is the subject-matter of the action, is in dispute, but the question is merely one of administration or account, it would seem that an assignee *pendente lite*, who is, whatever the event of the action may be, entitled to a valid interest in the property, and concerned in any order which may be made affecting it, is a proper party to the action.

Thus in an action for the administration of the trusts of a will, where the plaintiffs assigned their interests *pendente lite*, Sir L Shadwell, V-C, unhesitatingly upheld an objection that the suit was defective, and could not proceed, because the assignee was not before the Court; his Honour considered the case to be analogous to that of a suit for redemption, which, he said, could not be maintained in the absence, *pendente lite*, of the person entitled to redeem (*r*)

Effect of
2 & 3 Vict
c 11.

It would seem that since the stat 2 & 3 Vict c. 11, when a suit has not been duly registered, a legal assignee *pendente lite* not having actual notice of the suit will not be bound, unless he is made a party; but that if he has not acquired the protection of the legal estate, the old rule will apply, and accordingly he will be bound though not a party.

Continuance
of action after
assignment

According to the present practice a cause or matter does not become defective by the assignment of any estate or title *pendente lite*, but in such a case the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved; and where, by reason of a change or transmission of interest, it becomes necessary or desirable that any person not already a party shall be made a party, an order that the proceedings shall be carried on between the continuing parties and such new party may be obtained *ex parte* upon an allegation of such transmission of interest (*s*)

Order of re-
vivor without
prejudice

Where one of two plaintiffs had after decree assigned his equitable interest in the subject-matter of the suit, and the chief clerk's certificate had been made after the assignment, the Court, on the application of the other plaintiff, made an order of revivor against the assignee, without prejudice to the question whether the assignee was bound by the certificate (*t*).

(*q*) See *Higgins v Shaw*, 2 Dr & War 356, 362, *Landon v Morris*, 5 Sim 247, 269, *Wood v Surry*, 19 Beav 551, *Massy v Batwell*, 4 Dr & War. 58, at pp 68, 80, *MacLeod v Annesley*, 16 Beav 607
(*r*) *Solomon v Solomon*, 13 Sim 516.

As to parties to actions for redemption, see *post*, pp 720 *et seq*, as to foreclosure, see *post*, pp 1003 *et seq*
(*s*) R S O, Ord XVII rr 1, 3, 4
See *Kino v Rudkin*, 6 Ch D 160
(*t*) *Vibart v. Vibart*, L R 6 Eq 251.

iv.—Sale, Mortgage, &c of Equity of Redemption.—A mortgagor, being the owner of the mortgaged property, may dispose of the equity of redemption therein

CHAP XXXV

Sale by mortgagor

A mortgagee may, pursuant to an agreement subsequent to and independent of the mortgage transaction, purchase the equity of redemption (u)

Purchase by mortgagee

Where a mortgagee in fee has purchased the equity of redemption, and taken a conveyance of it to himself, a conveyance from his trustee, in whom the legal estate was vested by the mortgage deed, will be presumed (v)

Where a mortgagor executed an agreement to release the equity of redemption to the mortgagee, and the agreement was not acted upon for twelve years, during which period the mortgagor continued in possession, when the mortgagee sold the property under his power of sale, it was held that the agreement must be treated as abandoned, and that the mortgagor was entitled to the surplus proceeds of the sale (w).

Abandonment of contract after lapse of time

A mortgagor may also assign any rights incident to his ownership of the equity of redemption (x) So it would seem that an assignment of a claim to reduce a conveyance into a mortgage is not champerty; in bankruptcy, at any rate, the trustee can sell such a right (y)

Champerty

The sale of incumbered estates is much facilitated by sect. 5 of the Conveyancing and Law of Property Act, 1881 (z), which enacts as follows —

Discharge of incumbrances on sale

Sect 5 —“(1) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon, but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount

Provision by Court for incumbrances, and sale freed therefrom

(u) *Ante*, p 16

(v) *Noel v Bowley*, 3 Sim 103

(w) *Rushbrooke v Lawrence*, L R 5 Ch A 3 See also *Harris v Horwell*, Glib 11.

(x) *Steers v Rogers*, (1893) A C 232 (patent rights)

(y) *Hartley v Russell*, 2 S & St 244 See *Seear v Lawson*, 15 Ch D 426, 434, C A

(z) 44 & 45 Vict c 41, s. 5

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"(2) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order proper for giving effect to the sale, and give directions for the retention and investment of the money in Court

"(3) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof

"(4) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made "

Definition of incumbrance.

An "incumbrance," within the meaning of this section, includes "a mortgage in fee or for any less estate, and a trust for securing money," as well as other charges, "and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof" (s).

Application by summons

An application for an order under this section must be by summons at Chambers; notice of the application must be served on parties interested; and the costs are in the discretion of the Court (a).

The jurisdiction of the Court under this section is discretionary. An application by a purchaser under this section was dismissed, where it was shown that an order directing the vendor to pay money into Court for the purpose of discharging an incumbrance on the land contracted to be sold would inflict great hardship upon him, inasmuch as the amount required for the purpose would have largely exceeded the amount of the purchase-money (b).

The Court will not act under this section, except in view of a particular sale (c).

An order under this section was made upon a sale of mortgaged property by the mortgagor's trustee in bankruptcy, though proceedings were pending to set aside the mortgage on the ground of fraudulent preference (d).

Where an application under this section is made in an action to which the incumbrancer, whose charge is intended to be provided for, is not a party, the order should follow the words

(s) 44 & 45 Vict c 41, s 2 (vii)
 (a) *Ibid* s 69, sub-ss (3), (4), (5),
 (6), (7) See *Patching v Bull*, 30 W.
 R. 244, *Duckin v. Duckin*, 30 W R.
 887, *Milford Haven Rail & Co. v.*
Mowatt, 28 Ch D. 402 For forms of
 orders, see Seton, pp 1374, 1589.

(b) *Re Great Northern Rail Co and*
Sanderson, 25 Ch D 788 See *Re Jack-*
son and Oakshott, 14 Ch D 851
 (c) *Patching v Bull*, 30 W R. 244
 (d) *Milford Haven Rail & Co v*
Mowatt, 28 Ch D 402

of the statute, and, after directing payment into Court of the purchase-money, and the setting aside of an amount sufficient to meet the incumbrance, should proceed to declare that thereupon any party should be at liberty to apply in Chambers for a declaration that the land is free from the incumbrance (e)

An equity of redemption may itself become the subject of mortgage, and each equitable mortgagee will generally have preference according to his priority in time, the maxim of equity being, *Qui prior est in tempore, potior est in jure* (f). Of the protection afforded by the statute law to the mortgagee of an equity of redemption, and by what means a subsequent mortgagee of the equity of redemption may obtain preference to a prior mortgagee of the equity, an explanation is given in other parts of this treatise (g).

Mortgage of equity of redemption

The powers of mortgagors to lease mortgaged lands without the concurrence of their mortgagees will be considered later (h)

Leases

Where there is an overriding mortgage of the entirety of an estate, partition will be decreed of the equity of redemption subject to the mortgage without the mortgagee being made a party to the action (i). Of course, the power of sale under a mortgage of the entirety is paramount to a partition (k).

Partition

A tenant in common whose share is subject to a mortgage thereby loses his right to partition against his co-tenant, except upon the terms of paying off the mortgage (l)

Mortgage of share to co-tenant

Where the owner of an undivided share of land mortgaged his share and remained in possession, and received more than his due share of the rents, on the sale of the property in a partition action, it was held that the claim of the mortgagor's co-owner in respect of the excess of rents received by the mortgagor must be paid out of the latter's share of the proceeds of sale in priority to the mortgagee (m)

Priority as between mortgagee of share and co-owner

Where, in a partition action, the mortgagees, to the extent of a moiety in value of the property, desired a sale of the property and a distribution of the proceeds in lieu of partition, but the owners of the equity of redemption desired a partition, it was held that the Court had a discretion, under sect 3 of the Parti-

When mortgagees may require sale in lieu of partition

(e) *Dickin v Dickin*, 30 W R 887
(f) *Fonb Eq Vol 1*, 5th ed 320,
and cases in note And see also *Exp*
Knott, 11 Ves 609

(g) *Ante*, Ch VII, p 46, *post*,
Ch LV, pp 1214 *et seq*

(h) *Post*, p 685

(i) *Swan v. Swan*, 8 Pri. 518, *Warte*

v Bingley, 21 Ch D 674, *Sinclair v*
James, (1894) 3 Ch 554

(k) *Re Norris*, W. N (1883) 65,
Sinclair v James, *supra* a.

(l) *Gibbs v. Haydon*, 30 W R 726,
Sinclair v James, *supra*

(m) *Heckles v Heckles*, W N (1892)
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Dissentient
co-owner
must redeem

tion Act, 1868 (*n*), to order a sale of the property, and that, as the mortgagees were persons interested "to the extent of one moiety or upwards" of the property, it was the duty of the Court, under sect 4 of the Act, at their request to exercise that discretion by ordering a sale of the property (*o*)

Where one of several tenants in common purported, on behalf of himself and his co-tenants, to enter into a contract for the sale of the property, which was subject to a mortgage, and the purchaser, under the belief that all the co-tenants would concur in the conveyance to him, paid off the mortgage, but one of the co-tenants refused to so concur; the purchaser then brought an action for specific performance of the agreement; it was held that the dissentient co-tenant must, as regards his share, redeem or be foreclosed, and that in case of redemption there should be a partition (*p*)

In an action for partition of a mortgaged estate only one set of costs can be allowed for each share, and if some shares are incumbered and some not, each owner of an incumbered share must bear the costs of his own incumbrancers (*q*).

Exchange.

Where an Inclosure Act authorizes exchanges to be made with the consent of the owner or proprietor of the lands exchanged, whether tenant in fee simple, fee tail, for life, or years, and provides that all incumbrances charged on the lands given in exchange shall become charged on those taken in exchange, it appears to be undecided whether the consent of the mortgagor in possession to an exchange is sufficient without the consent of the mortgagee (*r*) The Court, in a case of this nature, considered themselves not called upon to decide the point, as they had no right to presume that the consent of the mortgagee was not obtained, the commissioners not being bound to set out in their award all the authorities they had, and the presumption being that they acted according to their jurisdiction, unless the contrary appeared

Entail of
equity of
redemption

V.—Entail and Settlement of Equity of Redemption.—Prior to the decision that an equity of redemption was an estate in the land, and so long as the notion prevailed that it was but a right, the limitation of it by way of entail, or in strict settlement, seemed out of the question; and it was considered that

(*n*) 31 & 32 Vict c 40

(*o*) *Davenport v King*, 49 L T. 92.

(*p*) *Davies v Davies*, 6 Jur N S 1320.

(*q*) *Cotton v Banks*, (1893) 2 Ch 221 But see *contra*, *Belcher v Williams*, 45 Ch D 610

(*r*) *Goodtitle v Milburn*, 3 M & W 553

such an entail, if it could subsist, would tend to a perpetuity. But when the equity was declared to be the ancient estate without change of ownership, it became, of course, subject to all the limitations to which other estates in equity were liable (s)

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It had been long (t) settled that an equitable entail and remainders were barrable by such mode of assurance only as would have barred a legal entail and remainders By 3 & 4 Will IV c 74, abolishing fines and recoveries, a power of disposition has been given to tenants in tail of freehold lands by simple deed enrolled in Chancery, and of copyholds by deed enrolled in the manor, or by actual surrender (u).

Bar of entail

Where the legal estate is outstanding in a mortgagee, the failure of the particular estate does not destroy the contingent remainders in an equity of redemption (x)

Contingent remainders

It is a general rule, where an estate is settled subject to a mortgage, that the tenant for life of an equity of redemption shall be compelled to keep down the interest accruing during the period of his being in possession, for which purpose the reversioner or remainderman may bring an action for relief; and if the tenant for life suffer the interest to run in arrear, and die, the reversioner or remainderman may call on his personal representatives to discharge the arrears (y).

Tenant for life must keep down interest on mortgage

In an administration suit, the tenant for life must keep down the interest on all debts (z)

Administration suit

The obligation of the tenant for life to keep down the interest on incumbrances exists only as between him and the remainderman, and not as between him and the incumbrancers (a).

Nature of obligation

The mere laches of the incumbrancer in not enforcing payment of the interest from the tenant for life will not affect his remedy against the inheritance; but he may be precluded from recovering arrears of interest against the inheritance by collusion or other dealings with the tenant for life (b)

(s) Hard 469

(t) *Kirkham v Smith*, Amb 518
And see *Legat v Sewell*, 2 Vern 552

(u) See sects 15, 50, 53 of this Act

(x) *Astley v Michlethwait*, 15 Ch D 59

(y) *Hayes v Hayes*, 1 Ch Ca 223, *White v White*, 9 Ves 554, 560, *Long v Harris*, 1 Jur N S 913, *Shore v Shore*, 4 Drew 501, *Dixon v Peacock*, 2 Drew 288, *Makings v Makings*, 1 De G F & J 355, *Caulfield v Maguire*, 2 J & L 141, *Barnes v Bond*, 32

Beav 653 See also *Wastell v Leshe*, 13 L J Ch 205

(z) *Allhusen v Whittell*, L R 4 Eq 295, *Lambert v Lambert*, L R 16 Eq 320, *Marshall v Crowther*, 2 Ch D 199

(a) *Re Morley*, *Morley v Saunders*, L R 8 Eq 598

(b) *Loftus v Swift*, 2 Sch & L 642, *Wrixon v Vase*, 2 Dr & W 192, *Makings v Makings*, 1 De G F & J 358

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The reversioner (*c*) and the next tenant for life (*d*) may bring an action against the tenant for life to make the rents amenable, and may compel him to answer what has accrued, and they have an equity to have the estate recouped out of the future income accruing to the tenant for life (*e*)

It was said by Lord Romilly (*f*), that if the reversioner stand by and allow the interest to fall in arrear, the reversion will be charged, and the reversioner cannot afterwards establish a debt against the assets of the tenant for life on the ground that the rents were sufficient, but this dictum has been questioned (*g*).

Power of
appointment

He is not exempt from keeping down the interest by the possession of an absolute power of appointment (*h*).

Where a fund is insufficient to keep down the arrears of an annuity which become a charge on the corpus, the tenant for life is only bound to keep down the interest of the arrears (*i*).

Interest ex-
ceeding rents

But, if the rents are not sufficient to pay the interest which the tenant notwithstanding pays, he cannot claim the excess against the remainderman without having previously intimated to the latter his intention to charge the inheritance (*k*).

Tenant for
life answer-
able only
during pos-
session

The tenant for life, however, is only answerable during the period of his possession; and therefore, if there be tenant for life, with remainder over for life, under the same settlement, and the first tenant for life permit the interest to run in arrear, the second tenant for life shall not be compelled by the reversioner or remainderman out of the rents to discharge the arrears (*l*).

A careful distinction must, however, be drawn between the last-mentioned case and certain cases with which it may be easily confounded. As, for example, if an estate in mortgage be limited in strict settlement, subject to a jointure created by a prior settlement, and during the life of the jointress the surplus rents are not sufficient to keep down the interest, so that it runs in arrear, and afterwards the jointress dies in the lifetime of the tenant for life, on which there arises a surplus rent beyond the current interest, the tenant for life must, during the continuance

(*c*) *Caulfield v Maguire*, 2 J & L 160, *Hayes v Hayes*, 1 Ch Ca 223

(*d*) *Revel v Watkinson*, 1 Ves Sen 93

(*e*) *Waring v Coentry*, 2 My & K 406. But see the dictum of Lord Westbury *contra*, in *Scholefield v Lockwood*, 4 De G J. & S 22

(*f*) *Lord Kensington v. Bouverie*, 19 Beav 54.

(*g*) Lord Brougham in *Lord Kensington v Bouverie*, 7 H L C 564, *Baldwin v Baldwin*, 4 Ir Ch 505, *S C*, 6 Ir Ch 156.

(*h*) *Whitbread v Smith*, 3 De G M & G 741

(*i*) *Playfair v Cooper*, 17 Beav 187

(*k*) *Lord Kensington v Bouverie*, 7 H L C 557

(*l*) See 1 Ves Sen 95

of his estate in the property, apply the surplus rent in reducing the arrears (*m*) In like manner, if an estate be limited to A for life, with remainder (as to part) to B for life, remainder (as to the whole) to C for life, with power to A. to charge the estate with a sum of money, but not so as to encumber the life estate of B, and A charges the whole estate with a sum of money carrying interest, and dies, and then, during the life of B, the estate of C in possession is not sufficient to discharge the interest which runs in arrear, and afterwards B. dies in C's lifetime, C will be compelled to apply the surplus rents of the whole estate towards liquidation of the arrears (*n*)

A tenant for life will not be bound to keep down the interest on a mortgage on property, his enjoyment of which is postponed during the period of postponement So, where the trustees of a will paid out of the income of the testator's residuary estate the premiums on a mortgaged policy of assurance on a surviving life (the realization of which by surrender they postponed for the benefit of the estate), and the interest on the mortgage, on the falling in of the life, the mortgage was paid off out of the policy moneys received by the trustees, it was held that the tenant for life was entitled to be recouped the amount of income so expended with interest at 4 per cent out of the surplus policy moneys (*o*)

Liability to keep down interest where conversion postponed

It is a general rule that, where a testator makes to the same person several gifts, one of which is beneficial, and the other is onerous, the test as to whether the one gift may be taken and the other rejected, is whether or not the gifts are separate and distinct (*p*)

Rule as to gifts by same will of beneficial and onerous property

This rule has been applied in several cases as determining whether a tenant for life is liable to keep down the interest on estates which are settled, subject to a mortgage out of all property given to him by the will, or whether he is bound only to apply towards payment of the interest the income of such property as is subject to the mortgage

Gift including incumbered and unincumbered property

So, where a testatrix, being at the time of her death possessed in fee of two estates, one of which was subject to a mortgage,

Where the gift of several properties is

(*m*) *Revel v Watkinson*, 1 Ves Sen 93

(*n*) *Tracey v Hereford*, 2 Bro C C 128, *Sharshaw v Gibbs*, Kay, 333 See *Franks v Cooper*, 4 Ves 763

(*o*) *Re Morley*, *Morley v Haig*,

(1895) 2 Ch 738

(*p*) See *Jarm Wills*, 5th ed vol 1 p 422 See also *Talbot v Earl of Radnor*, 3 My & K 254, and *Guthrie v Walrond*, 22 Ch D 573 (cases of onerous leases)

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as an undi-
vided whole

and the other unencumbered, devised all her real and personal estate to trustees upon trust for sale at their discretion, and to invest the proceeds, and to hold such "real and personal estate" upon trust to pay the rents and annual produce thereof to A for life, with remainder to the use of B, "his heirs, executors, administrators, and assigns for ever, according to the nature and quality thereof respectively," it was held that the rents of the unencumbered estate were liable for the interest on the mortgage of the encumbered estate (q).

*Frewen v Law
Life Ass Soc*

So, also, where a testator devised certain estates subject to a term to raise money for payment of his debts to the use of his son for life, with remainder to his first and other son successively in tail male, and different parts of the devised estate were subject to various mortgages; it was held that, inasmuch as the testator had by his will given his estates as an undivided whole, the tenant for life was bound to keep down the interest in respect of the mortgages on the several parts of the estate out of the income of the whole (r).

Where gifts
are separate
and distinct

On the other hand, where a testator devised a freehold house on trust for A and B for life, and, after the decease of the survivor, directed that the house should form part of his residuary estate, and he also bequeathed an annuity to A and B, and subject thereto he devised his residuary estate upon trust for the benefit of certain persons; the rent of the house having proved insufficient to keep down the interest on the mortgage debt, it was held that A and B were not bound to make up the deficiency (s).

Annuity

Where money is borrowed by way of a grant of a redeemable annuity out of land, the annuity must be valued, and the tenant for life under the will of the borrower, as between him and the remainderman, is only bound to pay interest on the estimated value of the annuity at the death of the grantor (t).

Assignee of
tenant for
life

The assignee and judgment creditor of the tenant for life are subject to the same liability to keep down the interest as the tenant for life himself (u). Where the mortgagee (x) having permitted the tenant for life to run in arrear, purchased the life

(q) *Re Hotchkys, Freake v Calmaidy*, 32 Ch D 408, C A.

(r) *Frewen v Law Life Assurance Soc.*, (1896) 2 Ch 511.

(s) *Syer v Gladstone*, 30 Ch D 614.

(t) *Bulwer v Astley*, 1 Ph 422.

(u) *Scholefield v Lockwood*, 4 De G J & S 22.

(x) *Lord Penrhyn v Hughes*, 5 Ves 106, and *Amesbury v Brown*, 1 Ves Sen 477.

estate, the Court directed him to apply the surplus rent beyond the current interest towards liquidation of the arrears

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If the estate of the wife is subject to a mortgage, the husband and wife are not bound to keep down the interest for the benefit of the heir of the wife, and, therefore, the amount of interest actually due at the death of the wife should be added to the principal, and the husband, entitled as tenant by the curtesy, should keep down the interest of the aggregate sum during the remainder of his life. But he is not entitled to any allowance for interest actually paid by him during his wife's life (*y*)

Husband and wife

Where the estates of the husband and wife were mortgaged to secure the husband's debt, which was paid off out of the produce of the wife's estate, the representatives of the wife were not allowed interest on the sum paid against the husband's estate (*z*); apparently because it constituted a mere simple contract debt which did not carry interest

A tenant in tail in possession cannot be compelled to keep down the interest on a mortgage, because the reversioner and remainderman are considered as wholly in his power (*a*). But an exception to the rule arises if the tenant in tail is an *infant*, in which case the reasoning does not apply; and it is therefore decided that the guardians or trustees of an infant tenant in tail are bound to apply the rents in keeping down the interest; and if the guardian permits the interest to run in arrear during the infancy of the tenant in tail, an account of the rents and profits will be decreed after the infant's death (*b*). And even in the case of an infant tenant in fee, the guardian is bound to keep down the interest of incumbrances out of the rents, and not increase the infant's personal estate at the expense of the real estate (*c*). If a tenant in tail of full age keeps down the interest and dies, his personal representative will not be a creditor for the amount of interest paid, but the remainderman or reversioner will have the benefit (*d*); and in a case in which it appeared that a man, being seised of lands in right of his wife, who was tenant in tail in possession, subject to a subsisting mortgage, took in the mortgage, and during his wife's life was himself in receipt of the

Tenant in tail

(*y*) *Ruscombe v Hare*, 2 Bl N S 192

(*z*) *Lancaster v Eves*, 10 Beav 154, 266

(*a*) *Amesbury v Brown*, 1 Ves Sen 477, *Chaplin v Chaplin*, 3 P Wms 235

(*b*) *Sengison v Sealey*, 2 Atk 416, *Burgess v Mawbey*, 1 T & R 167, and cases there cited, *Bentley v Lord Abingdon*, 3 Mer 566

(*c*) *Jennings v Lookes*, 2 P Wms 276

(*d*) *Amesbury v Brown*, *sup* at p 481.

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rents, the Court, after the wife's death, on a bill filed by the reversioner to redeem, refused the husband interest on the mortgage during the period he had been in possession of the rents (e)

Persons
bound by
equity of re-
demption

vi.—Escheat and Forfeiture—Questions of great nicety formerly arose in reference to the persons on whom this equity of redemption was binding, but for the most part they have now ceased to have any interest. Lord Hale described it to be not merely a trust, but a title in equity, and to be inherent in the lands, and binding on all persons, whether in the post or otherwise (f); and although on the immediate establishment of the equity of redemption, ancient prejudices so far prevailed as to lead to a decision that lands conveyed to a mortgagee in fee became subject to his legal incumbrances, and to the dower of his wife (g), and therefore, in order to prevent the latter, it was usual to convey the lands to two persons in joint tenancy, yet this misconception was soon remedied, and the rights of the parties put upon the proper footing.

The Crown
and lords of
manors,
whether
bound

Notwithstanding, however, the strong opinion entertained by Lord Hale of the binding quality of this equity, great doubts once prevailed whether the redemption of a mortgage could be had against the king (f). And it was decided (h) that a lord of a manor was not bound by the equity on an escheat, if notice of such equity did not appear on his court rolls; although in another case (i) it was held that he was bound by the equity if there was a reference on the rolls to a deed giving notice of it, and that the mortgage money belonged to the personal representative of the mortgagee, and not to the lord.

No escheat of
property held
on trust or
mortgage

No such difficulty now exists, for it is enacted (k) that no lands, stock, or chose in action vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or

(e) *Amesbury v. Brown*, 1 Ves Sen 477. And see *Ware v. Polhill*, 11 Ves 278, *Ruscombe v. Hare*, 2 Bl N S 192. And see *Lord Penrhyn v. Hughes*, 5 Ves 99.

(f) *Pawlett v. Att-Gen*, 1 Eq Ca Abr 315. And see *Rogers v. Maule*, 1 Y & C. C. C. 4.

(g) *Nash v. Preston*, Cro Car 190. See Co Lut 205, a, n 1.

(h) *Att-Gen. v. The Duke of Leeds*, 2 My & K 343.

(i) *Weaver v. Maule*, 2 R & My 97. And see *Viscount Downe v. Morris*, 3 Ha at pp 404—406.

(k) 13 & 14 Vict c 60, ss 15 and 46, replacing 4 & 5 Will IV c 23.

survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place. But nothing contained in the Act is to prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if the Act had not passed.

Escheat or forfeiture of beneficial interest

The effect of this enactment is that the legal estate in mortgaged property no longer escheats to the Crown or to the lord of a manor on attainder or conviction of the mortgagee, and that the beneficial interest of the mortgagee does so escheat, but only to the extent of such interest; that is to say, subject to the equity of redemption of the mortgagor, which continues notwithstanding the escheat. The legal estate, as well as the beneficial interest in mortgaged property, may still escheat where the mortgagee is illegitimate, and dies intestate and without issue.

Effect of the enactment

Where an estate had been mortgaged for a term, and afterwards by way of equitable deposit of title deeds, beyond its value, it was held that the mortgagor was not a bare trustee under the Act for the mortgagee, so as to prevent an escheat of the legal fee to the Crown (l).

The Crown may redeem such estates as vest in it by forfeiture (m). But if a mortgaged estate had been seized by the Crown upon the mortgagor's outlawry for high treason and granted to another, and afterwards the outlawry had been reversed, upon the reversal the lessee was restored (n) to all that was not answered to the Crown, *i e*, to all but the mesne profits. His right of redemption therefore returned to him (o).

Forfeiture of equity of redemption

An equity of redemption of a mortgage in fee was liable to forfeiture for treason, but not for felony (p); but the equity of redemption in the case of a term was forfeited by either treason or felony (q). Now, however, forfeiture for treason and felony has been abolished (r), and administrators are

(l) *Rogers v Maule*, 1 Y & C C 4

(m) *Att-Gen. v Crofts*, 4 Bro P C 136

(n) *Rookley v Wilkinson*, Sir T Jones, 100, *Eyre v Woodsone*, Cro Eliz 278

(o) *Peyton v Ayliffe*, 2 Vern 312

(p) *Att-Gen v Sands*, Hard 488, *Lovell's case*, 1 Salk 85, *Att-Gen v*

Crofts, 4 Bro P C 136. But see *King v Drummond*, Cro Jac 513, and Sugd Gilb on Uses, 78, note. By 54 Geo III c 145, corruption of blood is in all cases saved except for treason, petit treason, and murder. See 1 Jarm on Wills, 5th ed p 45

(q) See Sug Gilb on Uses, 79

(r) 33 & 34 Vict c 23

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appointed by the Crown of the property of any convict, who may pay his debts; and the property of the convict, on completion of his sentence or on his death, reverts to him or his heirs

Escheats of equity of redemption in realty

Formerly, in case of death intestate and without an heir, the equitable interest of a *cestui que trust* in land, or in the proceeds of sale of land devised upon trust for sale, did not escheat to the Crown, but vested beneficially in the trustee(s) similarly, in such a case an equity of redemption was not liable to escheat, and, accordingly, Lord Eldon thought that the mortgagee might refuse to be redeemed by anyone (*t*) It was, however, decided in a later case that the mortgagee was subject to the debts of the mortgagor, whose administrator could redeem, and the title of the mortgagee was held not to be complete even after twenty years; as although ordinary debts would be barred, yet a debt on covenant not yet broken might arise at any moment (*u*).

Intestates Act, 1884

But now, by the Intestates' Estates Act, 1884 (*x*), where a person has died since the 14th of August, 1884, without an heir and intestate in respect of any real estate consisting of any equitable estate or interest in land, corporeal or incorporeal, the law of escheat is to apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments.

Crown subject to debts

When an estate is mortgaged beyond its value, but the legal estate is left in the mortgagor and escheats to the Crown, the estate may be sold in an administration suit, and a grant be applied for from the Crown (*y*), or in a suit by the mortgagee (not being a creditor's suit) he will be decreed to hold against the Crown until the mortgage debt is paid (*z*).

Prerogative of Crown as to mortgaged personalty

If a mortgagor of personalty dies intestate without any next of kin, the Crown, by virtue of its prerogative, will stand in their place (*a*), subject, nevertheless, to the right of his widow to the amount or value of 500*l* (*b*), and to a moiety of the residue of the mortgaged property, if of greater amount or value (*c*).

Escheat to lord

The lord, under the reservation of the equity of redemption to

(*s*) *Burgess v Wheate*, 1 Ed 177
And see *Fawcett v Lowther*, 2 Ves Sen 300, 304, *Taylor v Haygarth*, 14 Sim 8, 17, *Re Lashmar, Moody v Penfold*, (1891) 1 Ch 258, C A

(*t*) *Gordon v Gordon*, 3 Swanst 470

(*u*) *Beale v Symonds*, 16 Beav. 406

(*x*) 47 & 48 Vict. c 71.

(*y*) *Rogers v Maule*, 1 Y & C C C 4

(*z*) *Hodge v Att - Gen*, 3 Y & C Ex 342

(*a*) *Taylor v Haygarth*, 14 Sim 8, *Powell v Merrett*, 1 Sm & G 381
See 39 & 40 Vict c 18, repealing 15 & 16 Vict c 3

(*b*) 53 & 54 Vict c 29

(*c*) See *Cave v Roberts*, 8 Sim 214

the mortgagor, his heirs, executors, administrators, and assigns, takes it by escheat, as an assign in law, as belonging to the inheritance (*d*) So the lord would, in equity, be entitled to a term of years attendant upon the inheritance as part of the escheated property (*e*), and a mortgagee of a term cannot (at least since 3 & 4 Will IV c 104, under which the lord out of the lands escheated has to pay the mortgage debt (*f*)), hold the term against the lord claiming to redeem as taking the reversion by escheat (*g*)

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vii.—Curtesy and Dower—In consistency with the anomalous decision of equity, that there should be a tenancy by the curtesy, but not dower, of a trust estate, the like was decided of an equity of redemption The right to tenancy by the curtesy was at first disputed, on the notion already mentioned, that the equity was but a *right*, of which a seisin could not be had by the wife so as to give title to the husband, but Lord Hardwicke, in deciding the equity to be an estate, decided also the right to the tenancy by the curtesy (*h*).

It was formerly regarded as settled that a widow could not claim dower out of an equity of redemption (*i*), though the contrary was held in one case (*j*) But the statute 3 & 4 Will IV. c 105, removed this anomaly in cases of women married subsequently to the 31st of December, 1833, by enacting that when a husband shall die beneficially entitled to any land for an interest, which shall not entitle his widow to dower out of the same at law, and such interest, whether equitable or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same.

The statute has, however, placed the right to dower in an equity of redemption absolutely within the disposal of the husband, who may deprive his widow of it wholly or *pro tanto* by subsequent alienation or charge, or by simple declaration of intention by deed or will

(*d*) Co Lit 215 a

(*e*) *Thurston v Att-Gen*, 1 Vern 340

(*f*) *Evans v Broun*, 5 Beav 114,
Hughes v Wells, 9 Ha 750

(*g*) *Viscount Downe v Morris*, 3 Ha 394 See *Rogers v Maule*, 1 Y & C O C 4, *Hancock v Att-Gen*, 12 W R 569, V-C Kindersley

(*h*) *Casborne v Scarfe*, 1 Atk 602, *anti*, p 627

(*i*) *Att-Gen v Scott*, Cas t Talb (Williams) 138, and cases in note, *D'Arcey v Blake*, 2 Sch & L 391 See also *Dixon v Saville*, 1 Bro C C 326

(*j*) *Banks v Sutton*, 2 P Wms 700

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Devolution of
equity of
redemption in
freeholds.

viii.—Devolution, Devise, &c., of Equity of Redemption —

An equity of redemption being an estate in the land without change of ownership, it necessarily follows that its line of devolution must, in the course of descent, be governed as the land itself would have been, by the general law (*h*), or by the *lex loci*, and therefore, if the land be of gavelkind tenure, the equity of redemption will be divisible in like manner; or if the tenure be borough-English, the youngest son will be entitled. So an equity of redemption in copyholds will descend to the customary heir of the mortgagor, as the legal estate would have done (*l*). It also follows that the doctrine of *possessio fiatus* would formerly have applied in exclusion of the half-blood (*m*).

Devise of
equity of
redemption

A devise of the equity of redemption will be valid if attended with the like formalities as the law requires for a devise of the land (*n*).

It may be here observed that, until the period for redemption has arrived, the mortgagor has a right of entry only, but such a right is now devisable at law (*o*). Even before the Wills Act, though probably a devise made by the mortgagor in the interval before breach of the condition might not have been maintainable at law (*p*), there can be no doubt that it would have been good in equity, whether the mortgagor died before or after the breach of the condition.

Revocation of
will by mort-
gage under
old law

Before the Wills Act, which makes wills speak from the death, a will was only revoked *pro tanto* by a subsequent mortgage of the devised land, if such mortgage was confined to the purposes of the security (*q*), but a mortgage by a disentailing deed, which limited the equity of redemption to the mortgagor in fee, was a total revocation of a prior will (*r*).

Devolution of
equity of re-
demption in
copyholds

As the mortgagor of copyhold lands remains tenant to the lord until the admittance of the mortgagee, the copyholds will on his death descend to his customary heir, though the lord has accepted rent from the surrenderee (*s*), and a heriot will

(*h*) *Duly v Nalder*, 11 Jur N S 921

(*l*) *Fawcett v Lowther*, 2 Ves Sen 300, 304 See *Blake v Foster*, 2 Ba & Be 387, 402

(*m*) But see 3 & 4 Will IV c 106, s 9

(*n*) *Philips v. Hele*, 1 Rep in Ch 190.

(*o*) 1 Viet c 26, s. 3

(*p*) See 2 Ch Ca 8

(*q*) *Perkins v Walker*, 1 Vern 97, *Hall v Dench*, 1 Vern 392, *Braun v Braun*, 6 Madd 221 See *Youde v Jones*, 13 M & W 534

(*r*) *Power v Power*, 9 Ir Ch R 178, *Sparrow v Hardcastle*, 3 Atk 798, *Harmood v Oglander*, 8 Ves 107, *Loche v Foote*, 5 Sm 618

(*s*) *Froese v Welsh*, Cro Jac 403

become due (*z*); and the mortgagor remains liable to the lord for services, and for the purpose of forfeiture (*u*), and before 55 Geo III. c 192, a surrender to the use of his will was necessary (*x*).

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A surrenderee, not being tenant until admittance, cannot in the meantime pass the lands by surrender (*y*), although he may make an equitable transfer of them. He may also devise the lands, and, in the case of a will made before the 1st of January, 1838, they would have passed in equity (*z*), but the devisee was not entitled to admission as legal tenant, for a legal devise of copyholds could not be made before admittance (*y*); and, therefore, although the devisee was admitted, the surrenderor or his heir still remained tenant to the lord. But equity considered the legal tenant to be a trustee for the devisee. The proper course to be pursued, probably, was for the heir of the surrenderee to be admitted and to make a surrender to the devisee. In *Doe v Vernon* (*a*), it was held that the devisee (who had been admitted) of a devisee, who had died without admittance, could not maintain ejectment as the legal tenant.

Devise

The principle that a mortgage of property does not affect the devolution or testamentary disposition of the mortgaged property applies to personalty no less than realty; and, accordingly, an equity of redemption in personalty vests, on the death of the mortgagor, in his personal representatives, to be applied by them in due course of administration.

Devolution, &c of mortgaged personalty

ix.—Liability of Equity of Redemption to Mortgagor's Debts.

—An equity of redemption, being an estate of the mortgagor, is liable in his hands to satisfy the claims of creditors, whether by specialty or simple contract, and they may enforce their claims by entering up judgment, and proceeding thereunder against the property subject to the mortgage.

Liability of equity of redemption to mortgagor's debts

By sect. 11 of the statute 1 & 2 Vict c 110, the sheriff is empowered to deliver in execution to judgment creditors all lands, &c. of their debtors; and by sect 13 of the same Act, a charge upon the real estate of a judgment debtor was created

Judgments under 1 & 2 Vict c 110

(*z*) Watk Cop, 4th ed p 104, 2 Pow Mtg, 6th ed p 1071.

L. R 3 Ch A 615.

(*u*) *Doe v Wroot*, 5 East, 132, *Floyd v Aldridge*, cited 5 East, 137, *Reg v Mulamay*, 5 B & Ad 254, Pow Mtg, 6th ed p 433 a, n. See *Fawcett v Lowther*, 2 Ves Sen 300, *Minton v Kirwood*, L R 1 Eq 449, affirmed

(*a*) 1 Scriv Cop, 4th ed p 210.

(*y*) *Doe v Tofteld*, 11 East, 246

(*z*) *Davis v Beversham*, 3 Rep. in Ch 2

(*a*) 7 East, 8, *Phillips v Phillips*, 1 My & K 649

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23 & 24 Vict
c 38

to take effect in favour of a creditor who had entered up his judgment

In 1860, by 23 & 24 Vict c. 38, an alteration was effected in respect of judgments, statutes, or recognizances entered up after the 23rd July, 1860, and no mortgagee was affected thereby, unless the writ of execution thereon had been issued and registered under the above statute, and also executed within three calendar months from such registry

27 & 28 Vict
c 112

In 1864 a further alteration was made in the law, and a judgment creditor has now no lien, until the land has been actually delivered in execution By 27 & 28 Vict c 112, s 1, no judgment, statute, or recognizance entered up after the 29th July, 1864, shall affect land of any tenure, until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or *other lawful authority* in pursuance of such judgment

Equity of re-
demption
extendible
at suit of
Crown,

Under an extent at the suit of the Crown, an equity of redemption (*b*), or any other equitable interest in lands except copyholds, to which the debtor is beneficially entitled (*c*), can be actually taken and delivered in execution, and may be sold to satisfy the Crown debt (*d*)

On an application for an order for sale of a Crown debtor's equity of redemption in lands, under the statute 25 Geo III c 35, notice must be given to the mortgagee, of the intended motion for an order to sell the estate subject to the mortgage, and under this order the sheriff ought to sell the equity of redemption only And where the whole estate was sold without reference to the mortgage, the Court refused to order payment of the mortgage out of the proceeds of the sale, without the consent of the mortgagor; but directed a reference to the deputy-remembrancer, to ascertain what was due on the mortgage (*e*).

—not at suit
of subject

An equity of redemption, whether in a freehold estate (*f*) or a term (*g*), cannot be extended by the sheriff at the suit of a

(*b*) *R v Coombes*, 1 Pri 207, *Fenton v Philpot*, 12 Pri 197

(*c*) *Att-Gen v Sands*, Hard 495, *Devonshire's Case*, 11 Rep 92 See 13 Eliz c 4, s 5

(*d*) *R v De La Motte*, Forr 162 See 13 Eliz c 4, 25 Geo III c 35, 28 & 29 Vict c 104, s 50

(*e*) *R v Coombes*, 1 Pri 207

(*f*) *Plunket v Penon*, 2 Atk 290, *Thornton v Finch*, 4 Giff 515, *Halton v Haywood*, L R 9 Ch A 229, *Anglo-Italian Bank v Davies*, 9 Ch D 275, C A

(*g*) *Salt v Cooper*, 16 Ch D 544 See *Burdon v Kennedy*, 3 Atk 738, *Lyster v. Dolland*, 1 Ves Jun 431.

subject, and, accordingly, a creditor cannot, by entering up judgment and suing out a writ of *elegit*, obtain a charge, by virtue of sect. 11 of the statute 1 & 2 Vict c 110, upon lands in mortgage

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In such a case, however, the creditor can obtain equitable execution which will give him a charge under sect. 13 of that Act

Equitable execution.

For this purpose, the aid of equity may be invoked by writ of assistance, sequestration, or the appointment of a receiver

Writs of assistance have now become virtually obsolete, though the Court has still power to grant, and has under special circumstances recently granted, such writs in aid of judgments for the recovery of land or delivery of chattels (*h*)

Writ of assistance

Sequestration is a prerogative process addressed to Commissioners, empowering them to enter upon real estates and sequester the rents, and upon the personal estate and effects of a person in contempt for disobedience of a decree or order, and to keep the same until the defendant clear his contempt (*i*)

Nature and effect of sequestration

Equitable execution of an equity of redemption or other interests in land not extendible, is usually effected by means of an appointment by the Court of a receiver of the rents and profits of the lands (*k*) Inasmuch as equity is now administered by all Divisions of the High Court, a judgment creditor may now, without commencing a fresh action or suit for the purpose, make an interlocutory application by motion or summons in Chambers, in the action in which he has recovered judgment, for the appointment of a receiver (*l*)

Appointment of receiver

In a case where the giving security by the receiver was part of the order appointing him, and, therefore, the order was not complete without security being given (*m*), yet the omission to give such security was held not to prevent the order from operating as a delivery of the land in execution (*n*)

Omission of receiver to give security

An equity of redemption in chattels cannot be seized and sold by the sheriff If goods are taken in execution, and it appears that they have been previously assigned by way of bill of sale, it

Equity of redemption in chattels

(*h*) See *Hall v Hall*, 47 L J Ch 680, *Wyman v Knight*, 39 Ch D 165 See also *Kazs de la Borde v Othon*, 23 W R 110

(*i*) Wharton, Law Lex s v "Sequestration" See also R S C, Ord XLIII r 6

(*k*) *Anglo-Italian Bank v. Davies*, 9 Ch D 275, 291, C A

(*l*) *Smith v Cowell*, 6 Q B D 75, C A, *Westhead v Riley*, 25 Ch D 414

(*m*) *Edwards v Edwards*, 2 Ch D 291, C A See *Defries v Creed*, 34 L J Ch 607

(*n*) *Exp Evans, Re Watkins*, 13 Ch D, 252, C A

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Satisfaction of debt out of rents and profits, or by sale	Where a judgment creditor has obtained equitable execution by means of a receivership order over the mortgaged lands of his debtor or otherwise, he may, subject to the rights of prior incumbrancers, satisfy his debt out of the rents and profits, or he may, by virtue of the charge created by sect 13 of the stat. 1 & 2 Vict. c 110, proceed to a sale of the lands for the satisfaction of his debt, under sect. 4 of the stat. 27 & 28 Vict c. 112, in like manner as if he had actually sued out execution by means of a writ of <i>elegit</i> .
Equity of redemption vests in trustee of bankrupt mortgagor	On the bankruptcy of a mortgagor, the equity of redemption in the mortgaged property passes to the official receiver until the appointment of a trustee, and then to the trustee, whether the property be valuable or not (q).
Power of attorney	The trustee may make a valid release of the equity of redemption to the mortgagee (r). A power of attorney by a mortgagor to his agent is at an end on his bankruptcy; the receipt of the agent afterwards is not as agent for the trustee, and the annulment of the bankruptcy does not vest in the bankrupt any right to recover such rents (s)
Disclaimer of onerous property	By sect. 55 of the Bankruptcy Act, 1883 (t), the trustee is empowered to disclaim property of the bankrupt consisting of land burdened with onerous covenants, or of shares, or stock in companies, unprofitable contracts, and other unsaleable property; such disclaimer is, however, only effectual for the purpose of releasing the bankrupt and his trustee, and does not affect the rights of a mortgagee as against the property
Vesting order.	Under the Bankruptcy Act, 1869 (u), which contained a similar power of disclaimer, it was decided, where the owner of freeholds burdened with onerous covenants, the title deeds of which he had deposited by way of equitable mortgage, became

(o) *Scarlett v. Hanson*, 12 Q B D 213, C A.

(p) R S C, Ord LVII r 12, substituted for sect 13 of the Common Law Procedure Act, 1860 (23 & 24 Vict c 126), repealed by 46 & 47 Vict c 49

(q) *Deeborough v Harris*, 5 De G. M & G 439.

(r) *Melbourne Banking Corp v Brougham*, 4 App Cas 156, J C

(s) *Markwick v Hardingham*, 15 Ch D 339, C A

(t) 46 & 47 Vict c 52
(u) 32 & 33 Vict c 71

bankrupt, and the trustee disclaimed, and subsequently the trustee and the bankrupt purported to convey the property to the mortgagee, that the conveyance was inoperative, and that the legal estate was outstanding, and could not be got in under the Trustee Act, 1850 (*x*), it having apparently, on the disclaimer, become vested in the Crown (*y*). Now, however, the Court has power, under sect. 55 (6) of the Act of 1883, by order, to vest the disclaimed property in any person entitled thereto, and it would seem that in such a case an order would probably be made vesting the property in the mortgagee or his assign

An equity of redemption is assets applicable for payment of the debts of a deceased mortgagor (*z*).

Liability of equity of redemption for debts of deceased mortgagor

Assets in a court of equity are legal or equitable. If they are of chattel interest and legal, they will be administered by the personal representatives of the deceased in a due course of administration. If they are assets real and legal, the heir or devisee will take subject to the debts of his ancestor or testator. If assets, whether real or personal, are equitable, they will be applicable in satisfaction of all the creditors *pari passu*, except that judgment creditors who have a lien under any statute (*a*) are also entitled to preference in the distribution of equitable assets.

Legal and equitable assets

Where, under the old practice, assets might have been made available in a court of law, they are legal assets; and when they could only have been made available in a court of equity, they are equitable assets. Assets are not equitable merely because the interest of the testator or intestate was equitable (*b*).

Before the Statute of Frauds (*c*) beneficial interests in trust estates were not legal assets, and, on the balance of authorities, not even equitable assets (*d*). By that statute, trust estates in fee simple were rendered liable to an execution ~~at law~~ (as they are now under 1 & 2 Vict. c. 110), it being thereby enacted, that if any *cestui que trust* thereafter should die, leaving a trust in fee simple to descend to his heir, such trust should be deemed and taken to be assets by descent, and the heir should be liable to and chargeable with the obli-

Trust estates

(*a*) 13 & 14 Vict. c. 60

(*y*) *Re Mercer and Moore*, 14 Ch. D.

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(*z*) See generally as to the application of assets to the satisfaction of claims on the estate of a deceased person, Williams on Executors, pt. iv

book 1

(*a*) *Vide sup* pp. 647, 648.

(*b*) Williams on Executors, 9th ed. pp. 1546 *et seq*.

(*c*) 29 Car. II. c. 3, s. 10.

(*d*) Williams on Real Assets, p. 18

CHAP XXXV	gation of his ancestor for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended
Equity of redemption in freeholds is legal assets	Thus a trust estate of inheritance became legal assets, and, by analogy, it was held that an equity of redemption in freeholds was also legal assets (<i>e</i>) In <i>Plunket v Penon</i> (<i>f</i>), Lord Hardwicke determined it to be equitable assets, and that the heir might, on an action against him by a specialty creditor, plead <i>riens per descent</i> (<i>g</i>); but this has been overruled (<i>h</i>)
Inheritable interests in realty	Inheritable interests in real estate, not charged with the payment of debts, are governed (whether legal or equitable), as to liability to debts, by 3 & 4 Will IV. c 104 (<i>i</i>). Having regard to this Act, an equity of redemption in fee is, for all practical purposes, applicable to the payment of debts on the same footing as legal assets (<i>k</i>), notwithstanding the old cases (<i>l</i>). The priority which this Act gave to creditors by specialty over other creditors is now abolished (<i>m</i>).
Reversion in fee	If the mortgage is but for a term of years, leaving a legal reversion in the mortgagor, the reversion in fee will be, of course, legal assets (<i>n</i>), for the specialty creditors might have judgment at law with a <i>cesset executio</i> until the reversion fell into possession (<i>o</i>) The judgment at law will be only of assets <i>quando acciderint</i> , but the creditor may, by suit, compel the heir to sell the reversion, even, as it seems, if it be expectant on an estate tail (<i>p</i>).
Judgments	If the mortgagee be in fee, and there be judgment creditors, who under any statute (<i>q</i>) have a lien, the equity of redemption will not, as to them, be applicable as equitable assets (<i>r</i>).
Copyholds	An equity of redemption in copyholds is legal assets (<i>s</i>).
Leaseholds	It would seem that an equity of redemption in a leasehold

(*e*) Freem Ch Pl 130 Thereporter adds, "Come al moy fuit dit per Sur F Winnington, il esteant de concilio en le case," and see 3 Leon 32

(*f*) 2 Atk 290 And see *Solley v Gower*, 2 Vern 61, *Clay v Willis*, 1 B & Cr 372

(*g*) *Plucknet v Kirk*, 1 Vern 411

(*h*) *Cook v Gregson*, 3 Drew 547, *Shes v French*, 3 Drew 716, *Atten v Brunning*, 8 H L C 243, *Christy v Courtenay*, 26 Beav. 140, *Mutlow v Mutlow*, 4 De G & J 539

(*i*) *Richardson v Jenkins*, 1 Drew. 477

(*k*) *Foster v Handley*, 1 Sim N S 200, 15 Jur 73, *Re Burrell*, L R 9 Eq 443

(*l*) *Solley v Gower*, 2 Vern 61, *Plunket v Penon*, 2 Atk 290

(*m*) 32 & 33 Vict c 36

(*n*) *Plucknet v Kirk*, 1 Vern 411

(*o*) *Plunket v Penon*, *sup*

(*p*) See *Tyndale v Ware*, 1 Jac 212, and cases there cited

(*q*) *Vide sup* pp 647, 648

(*r*) *Sharpe v Earl of Scarborough*, 4 Ves 538

(*s*) *Re Burrell*, L R 9 Eq 443

estate is legal assets (*t*), notwithstanding some earlier decisions to the contrary (*u*)

The following have also been held to be legal assets — The equity of redemption of a mortgage of money charged on land (*x*), the surplus proceeds of sale of mortgaged property (*y*), and a personal chattel subject to a lien minus the amount of such lien (*z*)

Instances of
legal assets

An equity of redemption in inheritable real estate devised to trustees or executors for payment of debts is equitable assets (*a*)

Whether estates are devised to trustees or executors to sell for payment of debts, or descend to the heir charged by the ancestor with the payment of debts, will make no difference in their being accounted equitable assets; nor is it of any effect that the testator directs that the produce shall be considered as part of his personal estate (*b*).

(*t*) See *Cook v Gregson*, 3 Drew 547, 551

(*u*) *The Creditors of Sir Charles Cox*, 3 P Wms 342, *Hartwell v Chitters*, Amb 308, *Clay v Willis*, 1 B & Cr 372

(*x*) *Cook v Gregson*, 3 Drew 547

(*y*) *Christy v Courtenay*, 26 Beav 140

(*z*) *Glaholm v Rowntree*, 6 A. & E 710

(*a*) See *Lewin v Okeley*, 2 Atk 50, and cases in note *Clay v Willis*, 1 B & Cr 372, *Silk v Prime*, 1 Bro C C 138, *Banker v May*, 9 B & Cr 489, overruling *Girling v Lee*, 1 Vern 63

(*b*) *Basley v Elms*, 7 Ves 319, *Shephard v Lutwidge*, 8 Ves 26, *Soames v Robinson*, 1 My & K 500, *Shakels v Richardson*, 2 Coll 31

CHAPTER XXXVI.

OF THE RELATION OF THE MORTGAGOR TO THE MORTGAGEE.

Mortgagor
estopped from
disputing
mortgagee's
title

i.—Generally —The mortgagor cannot dispute his mortgagee's title against his own solemn act (*a*), and it makes no difference though the mortgagor be a trustee acting in a public capacity and not for his own benefit (*b*); nor could he, during the existence of fines and recoveries, have barred the mortgagee's title by such mode of assurance (*c*). Nor can a purchaser of the equity of redemption from the mortgagor (*d*), or a party who, though a lessee, in fact defends the action for the benefit of the mortgagor (*e*), set up a legal title in a third person paramount to that of the mortgagor (*d*), or set up a prior legal mortgage from the mortgagor to a third person (*e*), in order to defend his own possession. But the rule does not apply when a subsequent purchaser or mortgagee for valuable consideration, without notice of the prior mortgage, obtains a valid legal conveyance from the mortgagor (who has in the meantime become clothed with the legal estate), or gets in an outstanding legal estate (*f*); though it would seem that such party might be bound by estoppel, if there was a positive recital of the legal seisin of the mortgagor contained in the mortgage deed (*g*); but not if the recital was that he was legally or equitably seised (*h*). There is an estoppel from the word "demise" (*i*), but none from the word "grant" (*j*). The whole deed must be looked at in order to decide whether there is an estoppel (*k*).

(*a*) *Goodtitle v. Bailey*, Cowp 601, *Doe v. Vickers*, 4 A. & E. 782, *Doe v. Clifton*, 4 A. & E. 813

(*b*) *Doe v. Horne*, 3 Q. B. 757, notwithstanding *Fairtitle v. Gilbert*, 2 T. R. 171.

(*c*) *Freeman v. Barnes*, 1 Vent. 55, 80, *Focus v. Salisbury*, Hard. 402. See *Fennor's Case*, 3 Rep. 77, *Smith v. Pierce*, Carth. 101, *Earl Pomfret v. Lord Windsor*, 2 Ves. Sen. 472, 482, *Hall v. Doe*, 5 B. & Ald. 687.

(*d*) *Doe v. Stone*, 3 O. B. 176

(*e*) *Doe v. Clifton*, 4 A. & E. 813

(*f*) *Right v. Bucknell*, 2 B. & Ad. 278, overruling *Bensley v. Burdon*, 8

L. J. (O. S.) Ch. 85. See *Goodtitle v. Morgan*, 1 T. R. 755, *Lloyd v. Lloyd*, 4 Dr. & War. 354, *Keate v. Phillips*, W. N. (1881) 72.

(*g*) *Right v. Bucknell*, *sup.* See *General Finance, & Co. v. Liberator, & Co.*, 10 Ch. D. 15, 22.

(*h*) *Right v. Bucknell*, *sup.*, *Heath v. Chealock*, L. R. 10 Ch. A. 22, 28, *Hungerford v. Becher*, 5 Ir. Ch. R. 417, 426.

(*i*) *Sturgeon v. Wingfield*, 15 M. & W. 224.

(*j*) *Heath v. Chealock*, L. R. 10 Ch. A. 22.

(*k*) *Crofts v. Middleton*, 2 K. & J. 194.

But a mortgagor may take out an originating summons under R S C Ord., LIV r. 1, to have a question of construction arising under the mortgage deed, without offering to redeem (*l*).

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Question of construction.

There is some obscurity in the books as to the position in which the mortgagor, during the period of actual possession, or receipt of the rents of the land, stands in respect to the mortgagee. The result of the cases, however, appears to be, that he may be considered as tenant for a term, or at will, or by sufferance, or a trespasser, according to circumstances.

Relation of mortgagor in possession to mortgagee

ii.—When the Mortgagor is Tenant for a Term.—Formerly it was the actual practice to insert in mortgage deeds a proviso that it should be lawful for the mortgagor to have quiet enjoyment of the property, until default should be made in payment on the day fixed by the mortgage deed. The effect of such a proviso was that the mortgage deed operated as a re-demise by the mortgagee to the mortgagor for the term allowed for payment of the money (*m*). As this term is now generally six months from the date of the mortgage deed, and the operation of the proviso would then cease, there is little or no practical advantage in inserting such a proviso, and it is now, in practice, usually omitted.

Proviso for quiet enjoyment by mortgagor till default

But where the proviso is merely that the mortgagee may enter and take possession on default in payment on the given day, or that the mortgagee shall not take the profits until default in payment, or, as it seems, that the mortgagor shall take the profits until default in payment (no definite time being in such last-mentioned case fixed for payment of the mortgage money), in any of these cases the proviso only amounts to a covenant, and the mortgagee may bring an action for the land at any time without notice, though by the proviso he be required to give notice before entry, or though there be a covenant for further assurance by the mortgagor in case of default in payment (*n*). The action can be brought, although a bill of

Default where no certain day of payment

(*l*) *Nobbs v Law Reversionary Interest Soc*, (1896) 2 Ch 880

(*m*) *Wilkinson v Hall*, 3 Bing N S 508, *Porcsey v Blackman*, Cro Jac 659. In a note to the case of *Doe v Maisey*, 8 B & Cr 767, it is considered that the case of *Porcsey v Blackman* does not bear out the above proposition. But, on perusing the case, it will be seen, it was admitted that if the pro-

viso had been in the form in the text, it would have amounted to a demise for a term. In the note it is ingeniously suggested that a mortgagor may be considered as tenant in fee determinable, as in the case of a shifting use under a marriage settlement, but this would be repugnant to the use already limited to the mortgagee in fee.

(*n*) *Doe v Day*, 2 Q B 147, *Doe v*.

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exchange has been given for the debt (o) In the earlier case of *Doe v. Goldwin* (p), where one of the trusts of a deed to secure an annuity was to permit the mortgagor to receive the rents until default in payment of the annuity, the Court of Queen's Bench held, upon the authority of *Wilkinson v Hall* (q), that the trusts amounted to a re-demise, and that notice to quit, given by the mortgagor to a tenant of the premises, was valid against a notice by the mortgagee to pay rent But, in his judgment in *Doe v. Day* (r), Lord Denman said, "It may be questioned whether sufficient attention was paid in that case to the point as to the certainty of time" The case can, therefore, hardly be considered as an authority

Effect of
proviso in case
of mortgage
of chattels

In like manner, in a mortgage of chattels personal, a proviso that the mortgagor shall hold till default, and then that the mortgagee may take possession, was held, in the Queen's Bench, not to prevent the immediate operation of the assignment, so as to vest the property in the goods in the assignee, though the clause authorized the mortgagor to make use of articles consumable, which was held to amount only to a licence to consume (s) But the mortgagee of chattels and leaseholds cannot, until he has a right of possession of the former, or until entry on the latter, maintain an action of trespass against a third person (t), nor until he has a right of possession to the chattels can he sue in trover (u).

Damages for
breach of
proviso.

The damage recoverable by the mortgagor for breach of such proviso is not the value of the chattels, but his interest in them (x).

Vesting of
property

The property, notwithstanding the proviso for quiet enjoyment, vests in the mortgagee (y).

Mortgage for
term of years

If the mortgage is for a term of years, with a proviso that the mortgagor shall continue in quiet enjoyment until the end of the term, or until default shall be made in payment of interest, or in the performance of some other obligation under the secu-

Lightfoot, 8 M & W 553, Bac Abr tit Leases, (K), Shep Touchst by Preston, 272, *Rogers v Grazebrook*, 3 Q B 895, *Metropolitan Counties Soc v Brown*, 1 E & E 832, *Doe v Kensington*, 8 Q B 429, *Trent v Hunt*, 9 Exch 14, *Doe v Barton*, 11 A & E 307, *Doe v Giles*, 5 Bing 421, *Doe v Mayo*, 7 L J K B 84, *Jolly v Arbuthnot*, 4 De G & J 224

(o) *Bramwell v. Eglinton*, 5 B & S. 39.

(p) 2 Q B 143

(q) 3 Bing N S 508

(r) 2 Q B 147

(s) *Gale v Bunnell*, 7 Q B 150, and the judgment in *Doe v Day*, 2 Q B 147

(t) *Wheeler v Montefiore*, 2 Q B 138

(u) *Bradley v Copley*, 1 C B 685

(x) *Fenn v Buttlestone*, 7 Exch 752, *Brierley v Kendall*, 17 Q B 937

(y) *White v Morris*, 16 Jur 500, C P

riety, it would seem that the mortgagor will be tenant of the mortgagee for the term defeasible on default (z) CHAP XXXVI

So, where the plaintiff on the 5th of December, 1833, mortgaged in fee with a proviso for redemption on payment of the principal and interest on the 5th of June, 1834, but the mortgagee covenanted not to call in the principal until the 5th of December, 1840, if the interest in the meantime was duly paid, and it was agreed that the mortgagor should quietly enjoy the premises until default, it was held that this agreement amounted to a redemise to him until the 5th of December, 1840 (a). Covenant not to call in money operating as redemise

The form of the proviso is immaterial, if the intention is clear "Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose" (b). Form of proviso

But the mere omission to take possession is not evidence of such an agreement; and where there is nothing more than such omission, the mortgagor holds possession merely on sufferance (c). Omission to take possession

A redemise is not created by a covenant on the part of the mortgagee not to take the profits until the day for payment of the money, or by a covenant that a mortgagee may enter after default it is no good lease, only a covenant, for the words are negative only and not affirmative (d). To create a redemise there must be a certain time fixed during which the mortgagor is to hold, and an affirmative covenant (e). Negative covenants not sufficient

iii.—When the Mortgagor is Tenant at Will—If no proviso for quiet enjoyment by the mortgagor is inserted in the mortgage Effect where there is no proviso for quiet enjoyment.

(z) *Powseley v Blackman*, Cro Jac 659

(a) *Wilkinson v Hall*, 3 Bing N C 508

(b) *Bac Ab tit Leases* (K)

—(c) *Jayson v Rush*, 1 Salk 209, *Turner v Meymott*, 7 Moo 574

(d) *Shep Touchst* by Preston, 272, *Doe v Lightfoot*, 8 M & W 553,

Rogers v Grazebrook, 8 Q B 895, *Powseley v Blackman*, Cro Jac 659, *Gale v Bunell*, 1 Q B 850

(e) *Doe v Goldwin*, 2 Q B 143, *Doe v Day*, 2 Q B 147, explaining *Wheeler v Montefiore*, 2 Q B 131, 1 Sm L C 6th ed p 523, 2 Dav. Conv 4th ed vol ii pt 2, pp 314, 315

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deed, it has been said that he will be deemed to be tenant at will of the mortgagee who, in the absence of such proviso, may enter into possession immediately upon the execution of the mortgage deed (*f*). A tenant at will is one who, *ab initio*, enjoys the land by the express or implied consent of the owner without there being any obligation on the part of either of the parties to continue the tenancy for any certain time (*g*). But, in some respects, a mortgagor under these circumstances is in a worse position than an ordinary tenant at will, inasmuch as the mortgagee may evict him without notice or demand of possession, and may retain the emblements (*h*).

Cases on question whether mortgagor is tenant of mortgagee considered.

In *Doe d Roby v Marsey* (*i*), Lord Tenterden is reported to have said that a mortgagor in possession was not in the situation of tenant at all; or, at all events, he was not more than tenant at sufferance, and that in a particular character, liable to be treated as tenant or trespasser, at the option of the mortgagee. But in a prior case (*h*), the Court of King's Bench appeared clear in opinion that the mortgagor might be considered as tenant in the strictest definition of that word, for the purpose of enabling the mortgagee to maintain an action for trespass against a third person; this was followed in a later case, where the mortgagee was allowed to declare "in case" as reversioner for injury to the premises, by removal of fixtures by the mortgagor's assignees (*l*).

In *Moss v Gallimore* (*m*), in which the estate was in the hands of tenants, the mortgagor was considered as a receiver for the mortgagee; but Lord Eldon (*n*) expressed his surprise at this doctrine, and said it was a misapplication of the principles of equity. In the earlier case of *Burch v. Wright* (*o*), Mr. Justice Buller considered it sufficient to designate the parties as mortgagor and mortgagee, without having recourse to any other description; and he considered that a mortgagor was neither a tenant at will nor receiver, nor was it necessary he should be so, for a mortgagor and mortgagee were characters as well known, and their rights, powers, and interests as well settled, as any in the law. But this view of the question does not meet the

(*f*) *Keech v Hall*, Doug 21, *Doe v Pullen*, 3 Sc 271

(*g*) Co Litt 270 b

(*h*) *Per Buller, J*, in *Burch v Wright*, 1 T. R. 378, at p 383

(*i*) 8 B & Cr. 767

(*k*) *Partridge v. Bere*, 5 B & Ald.

604

(*l*) *Hitchman v Walton*, 4 M & W

409

(*m*) Doug 283

(*n*) See *Exp Wilson*, 2 V & B

252

(*o*) 1 T R 383.

difficulty, for the rights, powers, and interests of mortgagor and mortgagee are in many instances grounded on their respective estates in the land, and therefore we are still driven back to the original question, what are those estates? The common law recognizes no such *estate* as that of mortgagor or mortgagee independently of some other known estate or interest in the land, for the *estates* both of mortgagor and mortgagee are of a compound nature, partaking partly of legal and partly of equitable rights; and it is difficult to perceive in what manner these compound estates can, as such, be regarded in a Court of law, although the possession of the mortgagor may, as noticed in the next chapter, confer on him certain privileges under the statute law and poor laws. In addition to this it may, under some circumstances, become essential to ascertain whether at common law there is any, and what, privity of estate between the parties; for if the mortgagor in possession may be considered as tenant at will, or, under the agreement for possession, as tenant for years, to the mortgagee, there will be sufficient privity of estate between them to admit of an enlargement by release alone, which will not be the case if he is to be considered as tenant at sufferance, or as agent or receiver. So long as the mortgagor is in possession of the land, and the legal ownership is in the mortgagee, there must subsist a tenancy of some sort between the parties (*p*), otherwise the mortgagor must be a trespasser, for the law of England recognizes no possession independent of a tenancy, either to the lord paramount or a mesne lord. The mortgagor in possession must hold of someone, and to say that his possession is that of a mortgagor, is in fact leaving the question undecided. At all events, the possession of the mortgagor is not adverse to the mortgagee (*q*).

But in *Doe v Giles* (*r*), it seems to have been considered that a mortgagor in possession is not a tenant at will. And in *Doe v. Barton* (*s*), Lord Denman observed, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words; but thus much is established by the cases of *Partridge v Bere* and *Hitchman v. Walton*, that the mortgagee may treat the mortgagor as being rightfully in possession, and

Definition of mortgagor's relation to mortgagees difficult

(*p*) *Partridge v Bere*, 5 B & Ald 604. See Lord Tenterden, in *Doe v Maisey*, 8 B & Cr 767, 3 Man & Ry 109

(*q*) *Doe v Williams*, 5 A. & E 291.
(*r*) 5 Bing 421
(*s*) 11 A & E 314

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himself as reversioner, so that, as long as he be not treated as a trespasser, his possession is not hostile to nor inconsistent with the mortgagee's right" (t) In the same case Patteson, J, observed, "It is very difficult to say what the mortgagor's estate is" (u) And in another case the same judge said, "One is much at a loss as to the proper terms in which to describe the relation of mortgagor in possession and mortgagee" (v)

Mortgagor
not tenant of
mortgagee
without
agreement

And upon this ground, that the mortgagor in possession is not tenant to the mortgagee without an agreement to that effect, and as such possession is consequently no estate in law, it will not support the grant of a rentcharge (y), and in a case of a covenant to surrender copyholds by way of mortgage, with grant of a power of distress to secure the interest, it was held that if the grant of the power of distress operated, as it probably did, as the grant of a rentcharge, the rentcharge was extinguished by the admission of the mortgagee, although the mortgagor remained in possession (y). But a grant of a power of distress by the mortgagor to the mortgagee, to secure the payment of interest, although it cannot operate as a rentcharge, from the time that the legal estate becomes vested in the mortgagee, may operate as a personal covenant that the mortgagee may seize such goods of the mortgagor as may be on the premises at the time the distress is made, and treat them as if distrained, and hence, there being no lien created on the specific goods, they would pass to the trustee in bankruptcy of the mortgagor (z). It would also seem, from another case, that a mortgagor in possession has not such an interest as can be taken under an *elegit*, so as to enable the creditor to eject a tenant, though the tenancy was created by the mortgagor subsequently to the mortgage and to the judgment. In the case referred to, it was held that under such circumstances the tenant could not, in answer to an action of covenant by his lessor (the mortgagor), plead eviction by the *elegit* creditor, as the plea at the same time disclosed the mortgage on the face of it, and therefore the want of right of possession in the *elegit* creditor (a)

Tenancy at
will created
by express
agreement.

An agreement in the mortgage deed that the mortgagor shall be tenant at will to the mortgagee, creates a strict tenancy at

(t) *Hitchman v Walton*, 4 M & W 409

(u) 11 A. & E 311.

(v) *Doe v. Williams*, 5 A & E 297.

(y) *Freeman v Edwards*, 17 L J. Ex. 258.

(z) *Id. , Doe v Goodier*, 10 Q B 957

(a) *Mayor of Poole v Whitt*, 15 M & W 571. And see *Parqeter v Harris*, 7 Q B 708

will, though an annual rent be reserved (*b*) And the relation of landlord and tenant may be created between them by a clause to that effect, although the mortgagor alone execute the deed (*c*), and the subsequent occupation of the premises by the mortgagor will be held to be under the tenancy, though the receipts given for the half-yearly payments of the rent are given in the name of interest (*d*)

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Such a stipulation must, however, be clear and consistent with the principal object of the deed, or it will be rejected, so, where a mortgage deed provided that the mortgagors should retain possession and receive the rents and profits till default, with a stipulation that the mortgagors should become tenants at will "henceforth," the stipulation was rejected as inconsistent on the ground that it would have rendered the mortgagors liable to a distress for rent before default (*e*)

A covenant for quiet enjoyment as tenant at will at a yearly rent is still only a tenancy at will, although there is a proviso that no possession shall be taken till the expiration of twelve months after notice of such intention, as no certain term is thereby created (*f*)

So an agreement to become tenant at the wish and pleasure of the mortgagee, at a rent payable on certain days of the year, is but a tenancy at will (*g*); and although the tenancy be nominally created for a term of years, the same effect of a tenancy at will is created by a power to enter at any time without notice (*h*)

It was decided that the mere receipt of interest from the mortgagor, or a distress for interest under a power contained in the mortgage deed, is not a recognition by the mortgagee that the mortgagor or his tenant was at that time in lawful possession (*i*)

Receipt of
interest does
not create
tenancy

But this must be distinguished from the case of rent *eo nomine*, demanded and received, or distrained for, by the agent of the mortgagee, from the tenant of the mortgagor, in payment of

(*b*) *Doe v Cox*, 11 Q B 122

(*c*) *Morton v Woods*, L R 4 Q B 294

(*d*) *West v Frutche*, 3 Exch 216

(*e*) *Walker v Giles*, 6 C B 662 See *Pimhoun v Souster*, 8 Exch 763, *Brown v Metropolitan, &c Insurance Soc*, 1 E & E 832 See also *Turner v Baines*,

2 B & S 435

(*f*) *Doe v. Davies*, 7 Exch 89

(*g*) *Doe v Cox*, 11 Q B 122

(*h*) *Morton v Woods*, L R 4 Q B 294

(*i*) *Doe v Cadwallader*, 2 B & Ad 473, *Doe v Goodier*, 10 Q B 957 See *Scobie v Collins*, (1895) 1 Q B 375

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Mortgagee
not trustee for
mortgagor

interest, which would prevent the tenant from being treated as a trespasser (*h*)

Although the mortgagor is equitable owner of the property, the mortgagee cannot be considered as a trustee for the mortgagor (*i*), even though the mortgage is in the form of a trust for sale (*m*); for a trustee is not allowed to deprive his *cestui que trust* of his possession, but a mortgagee may assume the possession whenever he pleases (*n*); if there is no agreement to the contrary, equity never interferes to prevent the mortgagee from assuming the possession, but for such purposes will consider the mortgagor a mere tenant at will (*o*)

Determina-
tion of
tenancy at
will

The mortgagor cannot determine the tenancy at will created by agreement by transferring his interest to another without notice to the mortgagee, so as to affect his right of distress (*p*); and a tenancy at will which existed before the mortgage is not determined by the mortgage (*q*).

Statute of
Limitations

The mortgagor is not tenant at will of the mortgagee within the meaning of the provision in the Statute of Limitations, that when any person shall be in possession or receipt of the rents and profits of any land, or in receipt of any rent as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action, shall be deemed to have first accrued at the determination, or at the expiration of one year next after the commencement of such tenancy (*r*). But where the mortgage has been paid off without any reconveyance the mortgagor is a tenant at will under sect 7 (*s*)

Delivery of
possession
under County
Court Act

Unless a strict tenancy is created between mortgagee and mortgagor in possession by payment of rent or otherwise, there is no jurisdiction, under sect. 138 of the County Courts Act (*t*), to order delivery of the mortgaged property to the mortgagee (*u*)

Mortgagor
holding over
after default

iv.—When the Mortgagor is Tenant at Sufferance.—If a mortgagor in possession under an express proviso that he shall continue

(*h*) *Doe v Hales*, 7 Bing 322, *Doe v Olley*, 12 A & E 481

(*i*) *Dobson v Land*, 8 Ha 216

(*m*) *Warner v Jacob*, 20 Ch D 220.

(*n*) *Doe v Maisey*, 8 B & Cr 767

(*o*) *Cholmondeley v Clinton*, 2 Mer 171 at p 359

(*p*) *Funhorn v Souster*, 8 Exch 763

(*q*) *Doe v. Carter*, 9 Q. B 863.

(*r*) 3 & 4 Will IV c 27, s 7

(*s*) *Sands to Thompson*, 22 Ch D 614

(*t*) 51 & 52 Vict c 43

(*u*) *Jones v Owen*, 18 L J Q B 8, *Re Banks*, 15 Jur 657 (cases decided under sect 122 of the stat 9 & 10 Vict. c 95)

in possession till default hold over after default without any new agreement, he will not necessarily be deemed to be more than a tenant at sufferance of the mortgagee (*x*) "A tenant at sufferance is where a man cometh to the possession first lawfully and holdeth over" (*y*) If the mortgagor has made default in payment of the principal and interest on the day appointed by the mortgage deed, generally six months from the date thereof, the operation of the proviso ceases, and thereupon the mortgagor, like any other tenant at sufferance, becomes liable to eviction by the mortgagee without notice or demand of possession (*z*), and will not be entitled to emblements (*a*). He may, at the option of the mortgagee, be treated as tenant or trespasser (*b*).

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19 tenant at
sufferance or
trespasser

If the mortgage is transferred to a third person, the mortgagor becomes a mere tenant by sufferance of the transferee, who may bring ejectment against the tenants of the mortgage without notice to quit (*c*).

Effect of
transfer of
mortgage.

v.—Attornment Clauses—In order to create the relation of landlord and tenant between the mortgagor and mortgagee, clauses of attornment by the mortgagor to the mortgagee are sometimes inserted in mortgages, where the mortgagor is himself in occupation of the mortgaged property; but it makes no difference to the rights of the mortgagee under the clause if the property is afterwards let by the mortgagor to an under-tenant (*d*).

Attornment
clauses.

Attornment clauses have in great measure fallen into disuse in consequence of the *dicta* of James and Bramwell, L JJ, in *Re Stockton Iron Furnace Co* (*e*), that the effect of such clauses is to render mortgagees liable as mortgagees in possession to account as against any second mortgagees or incumbrancers for rent received, or which but for their wilful default they might have received. The *dicta* were adopted by Jessel, M R, in *Exp Punnett* (*f*); but Bacon, V-C, in *Stanley v Grundy* (*g*),

(*x*) *Powseley v Blackman*, Cro Jac 659, *Smartle v Williams*, 1 Salk 245, *Thunden v Belcher*, 3 East, 449, *Doe d Roby v Massey*, 8 B & Cr 767, *Scobie v Collins*, (1895) 1 Q B 375

(*y*) Co Lit 217, a

(*z*) *Doe v Gules*, 5 Bing 421 See further as to mortgagee in possession, *post*, p 799

(*a*) *Bagnall v. Villar*, 12 Ch. D 812.

(*b*) *Doe d Roby v Massey*, 8 B & Cr 767

(*c*) *Smartle v Williams*, 1 Salk 245, *Thunden v Belcher*, 3 East, 449

(*d*) *Kearsley v Phillips*, 11 Q. B D 620 See Co Lit 311, a

(*e*) 10 Ch D at p 356

(*f*) 16 Ch D 235

(*g*) 22 Ch D 478

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refused to follow them. Having regard to this risk, it has very generally been considered by conveyancers that it is not advisable to insert these clauses in mortgage deeds.

Moreover, by recent statutory enactments, mortgagees have now been deprived of a great advantage formerly attaching to attornment clauses, namely, that by creating a tenancy such clauses enabled the mortgagee to distrain for the rent reserved thereby, thus affording him an easy and expeditious mode of enforcing the payment of his interest instead of being obliged to enter into actual possession of the property.

Avoidance of attornment clauses by Bills of Sale Acts as regards power of distress

The Bills of Sale Act, 1878 (*h*), enacts that attornments and other instruments giving powers of distress by way of security, shall be deemed bills of sale, within the meaning of the Act, of any personal chattels which may be seized thereunder and accordingly will be void as regards such property, unless registered in accordance with the requirements of the Act. And by the Bills of Sale Act, 1882 (*i*), every bill of sale given by way of security is required to have a schedule of the personal chattels comprised therein, and is void, except as against the grantor, in respect of any chattels not specifically described in the schedule, but it has been held that attornments need not be in accordance with the form prescribed by the Act (*l*).

The effect of the above enactments is to render an attornment clause in a mortgage wholly inoperative as regards the power of distress, whether such power is expressly given or is relied on as incident to the demise for the purpose of enabling the mortgagee to seize personal chattels not assigned to him by the mortgage (*l*), unless the mortgagee has actually entered into possession of the land, and, being in possession, has demised it to the mortgagor at a fair and reasonable rent (*m*).

Validity of attornment clauses in other respects

But, inasmuch as the Bills of Sale Acts do not include within their scope and operation real property, it has been held that attornment clauses, though invalid so far as they purport to give power to distrain personal chattels, are of effect, in other respects, in creating the relation of landlord and tenant between the parties, *e g*, so as to enable the mortgagee to issue a writ

(*h*) 41 & 42 Vict c 31, s 6, set out *ante*, p 201

(*i*) 45 & 46 Vict c 43, s 4

(*k*) *Green v Marsh*, (1892) 2 Q B 330, 335, C A

(*l*) *Re Wills, Exp Kennedy*, 21 Q B D 384, C A. See *Green v Marsh*, *sup*.

(*m*) See the saving proviso at the end of sect 6 of the Act of 1878.

specially indorsed with a claim for recovery of land under R S C Ord III r 6, and Ord XIV r 1 (*n*)

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Where a mortgage contained an attornment clause in the usual form, the mortgagor died, and his heir occupied and paid interest, it was held that the attornment clause created a mere tenancy at will which came to an end at the mortgagor's death, and that the payment of interest by the heir was not referable to payment of rent, he not having attorned, and therefore created no new tenancy (*o*) If the heir had himself attorned, he would have become tenant at will (*p*)

Attornment by mortgagor will not bind heir

Where the mortgagor had attorned to the mortgagee at a rent, and after the death of the mortgagee remained in possession and paid rent to his devisees, the subsequent occupation, coupled with the provisions of the deed, constituted the relation of landlord and tenant, though receipts were given as for interest, and the deed was executed only by the mortgagor (*q*)

Attornment by mortgagor binds him after death of mortgagee

An attornment by a mortgagor to a second mortgagee is valid although there was an attornment by him to the prior mortgagee (*r*)

Successive attornments

If a receiver is appointed, the attornment should be to him; and if he be appointed by a separate deed, the attornment should be by that deed (*s*)

Attornment to receiver

The tenancy created should be a tenancy from year to year, and not a tenancy at will only, as in the latter case it would be defeasible by the death of either party (*t*), but even where the tenancy is at will, it is not determined by the alienation of the mortgagor without notice to the mortgagee (*u*); and the mortgagor is tenant both in law and equity (*v*)

Term of tenancy

A tenancy under the attornment clause from year to year is not inconsistent with a power to enter and determine the tenancy (*x*) So, where under the mortgage deed the mortgagee became tenant to the mortgagee at a rent, but the mortgagee had a power of immediate entry on default in payment, it was held that the mortgagee might, on default made, eject

(*n*) *Daubuz v Lavington*, 13 Q B D 347 See *Hall v Comfort*, 18 Q B D 11, *Mumford v Collier*, 25 Q B D 279

(*o*) *Scobie v Collins*, (1895) 1 Q B 375

(*p*) *West v Frithche*, 3 Exch 216

(*q*) *Ibid*

(*r*) *Exp Punnett*, 16 Ch D 226

(*s*) *Dav Conv*, vol II pt II., p 93, *Byth and Jarm Conv*, vol III 4th ed p 1005, n

(*t*) *Turner v Barnes*, 2 B & S 435, 447—449

(*u*) *Finhorn v Souster*, 8 Exch 763, 768, 770

(*v*) *Anderson v Midland Rail Co*, 3 E & E 614

(*x*) *Re Threlfall*, 16 Ch D 274, C A.

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the mortgagor without notice to quit, or demand of payment (*y*), and that a distress for *rent* under the deed did not prevent the mortgagee from treating the mortgagor as a trespasser in respect of a *subsequent* default (*z*). And in such a case, the mortgagee may specially indorse the writ under R S C Ord III r 6 (*f*), and apply for summary judgment under Ord XIV (*a*)

Reservation
of rent in
attornment
clauses

The provision consists of an attornment by the mortgagor to the mortgagee at a rent usually the same in amount, and payable on the same half-yearly days, as the interest, with a proviso enabling the mortgagee to enter without notice and determine the tenancy (*b*). Upon assignment by the mortgagee, the power of distress for the arrears of interest is gone (*c*)

In the ordinary attornment clause, either the rent reserved is as of the same amount as the interest, or, if in excess, the surplus is applicable towards discharge of the principal (*d*).

The rent reserved must be fair and reasonable (*e*). The rent is sometimes made up partly of interest and partly of the principal, and if not unreasonable in regard to the value of the premises the tenancy will be valid (*f*)

The attornment creates a tenancy by estoppel (*g*); but the mortgagee is none the less a mortgagee because he is also landlord. The tenancy is created for better securing the interest

But if the rent is exorbitant, or if there is an arrangement that the attornment clause is only to come into operation upon bankruptcy, it will be a device to give a fraudulent preference and be void (*h*)

Fluctuating
rent

It was held no objection to an attornment clause that the monthly rent was fluctuating in amount (*i*)

Power of
distress

vi.—Power of Distress—Formerly a mortgagor in occupation of the property was sometimes required, instead of attorning, to

(*y*) *Doe v Tom*, 4 Q B 615, *Doe v Olley*, 12 A & E 481

(*z*) *Doe v Olley*, *sup*

(*a*) *Kemp v Lester*, (1896) 2 Q B 162, C A

(*b*) *Dav Conv*, vol II pt II p 95

(*c*) *Brown v Metropolitan, &c Insurance Soc*, 1 E & E 832

(*d*) *Dav Conv*, vol II pt II p 96 See also *Exp Harrison, Re Betts*, 18 Ch D 127, C A., *Exp Vorsev, Re Knight*, 21 Ch D 442, C A

(*e*) *Exp Williams*, 7 Ch D 138, *Re Stockton Furnace Co*, 10 Ch D 335, C A., *Exp Jackson, Re Bower*, 14 Ch,

D 725, C A See *Exp Vorsev, Re Knight*, 21 Ch D 442

(*f*) *Re Stockton Iron Furnace Co*, 10 Ch D 335, C A., *Exp Punnett*, 16 Ch D 226, C A., *Exp Isherwood*, 22 Ch D 384, *Exp Vorsev, Re Knight, sup*

(*g*) *Exp Punnett*, 16 Ch D 226, C A. See *Exp Vorsev, Re Knight, sup*, at p 452

(*h*) *Exp Williams*, 7 Ch D 138, *Exp Jackson, Re Bower*, 14 Ch D 725, C A., *Re Knight*, 46 L T 539 See *Exp Barter*, 26 Ch D 510

(*i*) *Exp Vorsev, Re Knight*, 21 Ch, D 442,

give to the mortgagee a power of distress, which did not of itself create any tenancy (*h*) CHAP XXXVI

The insertion of powers of distress in mortgage deeds is, however, now useless, and has fallen into disuse. Although the insertion of such a power may not render the mortgage a bill of sale within the meaning of the Bills of Sale Acts by virtue of sect 6 of the Act of 1878 (*i*), unless a rent is reserved by such instrument, yet it has been held that the power falls within the definition of bills of sale contained in sect 4 of that Act, as being a licence "to take possession of chattels as security for a debt," and is void accordingly, as not being in conformity with the requirements of the Act of 1882 (*m*); but the insertion of the power will not of itself vitiate the instrument as regards the other stipulations contained in it (*n*).

A mortgagee who had taken possession and had re-let the premises to the mortgagor was held to be entitled to distrain (*o*); and this right is expressly saved by sect. 6 of the Act of 1878 (*p*). Mortgagee in possession may distrain

vii.—Mortgagor in Possession entitled to Rents and Profits.—A mortgagor is not bound to account for the rents and profits while in possession, even although the security shall prove insufficient. For this *Colnan v. The Duke of St Albans* is in point (*q*). In that case the office of registrar of the Court of Chancery being granted for lives, and the fees of office being mortgaged, the patentee remained in receipt of the profits until only one life survived. Thereupon, the office having become an insufficient security, a bill was filed for an account of the past fees and emoluments received by the mortgagor, but a demurrer was allowed. Mortgagor not accountable for rent

In a more recent case in equity (*r*), a mortgage was made for 1,000*l*, and the property was in lease. The mortgagor became bankrupt. The mortgagee gave the tenant notice to pay the rent to him. The assignees nevertheless received the rent. A

(*h*) *Chapman v Beecham*, 3 Q B 723
See *Doe v Gooden*, 10 Q B 957,
Freeman v Edwards, 17 L J Ex
258

(*i*) 41 & 42 Vict c 31

(*m*) 45 & 46 Vict c. 43

(*n*) *Stevens v Marston*, W N (1890)

193 (*o*) *Dawson v. Johnson*, 1 F. & F.

(*p*) *Sup* p 201

(*q*) 3 Ves 25, *Hele v Lord Bealey*,
20 Beav 127, *Ford v Rackham*, 17
Beav 485, *Life Assoc of Scotland v*
Siddall, 3 De G & J 271

(*r*) *Exp Wilson*, 2 V & B 252
And see *Bertie v Lord Abingdon*, 3
Mer 560, *Gresley v Adderley*, 1
Swanst 573, *Thomas v Brigstocke*, 4

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petition by the mortgagee that the assignees might be ordered to pay to the petitioner the rent received was dismissed. The mortgagee does not receive the rent for the mortgagee.

Appointment
of receiver

In *Codrington v Johnston* (s), where the mortgagor in possession had consigned the crops of a West India estate to the consignee in England, and the bills of lading had been signed prior to an order of the Court of Chancery for the appointment of a receiver, it was held that the receiver was not entitled to the produce of the sale of such part of the crops as was unconverted at the date of the order. And the above principle applies to the heir or devisee of an estate charged with portions, &c, unless in an administration suit, and the estate be a deficient security (t).

Surplus rents
paid into
Court by
receiver

So, where a receiver had been appointed over a settled estate which was subject to a mortgage in fee, a mortgagee of the interest of the tenant for life, who had taken no steps to recover his debt and interest during the lifetime of the tenant for life, was held not to be entitled to an account of surplus moneys paid into Court by the receiver, but such moneys were held to form part of the personal estate of the deceased mortgagor (u).

Where under certain proceedings in Chancery not relating to the mortgage a receiver had been appointed, and the surplus rents paid into Court, and part of the money being due when the mortgage term expired by effluxion of time, the mortgagee applied to the Court to be paid the remaining debt out of the fund in Court, but without success (x). And in a similar case the same result followed, although the mortgagee had given notice to the tenants to pay him the rents, which, by reason of the appointment of the receiver, was disregarded. The mortgagee should have applied to the Court to divest the possession of the receiver (y). But where there was a sequestration in another suit, an equitable mortgagee was held entitled to back rents in the hands of the sequestrator (z).

Effect of
bankruptcy of
mortgagor

After decree for sale of a bankrupt's legal mortgage, the trustee is entitled to the rents till the time of sale (a), unless the mortgagee makes actual entry or gives notice to the tenants to pay the rents to him (a). *Secus*, as to an equitable mortgagee,

(s) 1 Beav 520

(t) *Ib*(u) *Lord Clarendon v Barham*, 1 Y

& C C 688, 704

(x) *Gresley v Adderley*, 1 Swanst. 573(y) *Thomas v Briscoe*, 4 Russ 64(z) *Tatham v Parker*, 1 Jur N S

992

(a) *Exp Living, Re Tombs*, 2 M &

A 223

who is entitled from the date of the order (b), or from time of entry (c), if the trustee has acquiesced, nor can the mortgagor be viewed in the light of a receiver, and, in fact, a receivership without liability to account appears a contradiction in terms, it being in truth an ownership

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viii.—Waste by Mortgagor—Although in equity the mortgagor remains the actual owner of the land until foreclosure, and is entitled, while in possession, to the receipt of the rents and profits without account, yet equity, regarding the land with all its produce as a security for the mortgage debt, will restrict the right of ownership within those bounds which may not operate to the detriment or injury of the mortgagee

Waste by mortgagor

On this principle equity will interfere to prevent waste by the mortgagor, and for that purpose grant an injunction on action brought by the mortgagee (d). If, after a decree for foreclosure, the mortgagor in possession begins to commit waste, he will be restrained by injunction, though no injunction be prayed by the action (e). But the mortgagee is not, as a matter of course, entitled to an injunction to prevent the felling of timber by the mortgagor, the Court must first be satisfied that the security is insufficient (f); but it was refused to a judgment creditor under the old law, suing the debtor's heir-at-law, by whom a satisfied mortgage term and an alleged fraudulent conveyance by the debtor was set up, on the ground that the plaintiff might have no interest in the property (g).

Felling timber

An equitable mortgagee can obtain *ex parte* an injunction restraining the mortgagor from parting with the legal estate (h).

Parting with legal estate

A mortgagee of a business, goodwill, and right to use the name, but who has never used it, can have an injunction against a person claiming under the mortgagor to prevent his using the name (i).

User of trade name

Where a mortgagor of leaseholds remains in possession, and becomes bankrupt, the mortgagee may recover against his

Fixtures

(b) *Exp Bignold*, 2 M & A 16(c) *Ib* 214(d) *Farrant v Lovel*, 3 Atk 723And see *Robinson v Luiton*, 3 Atk 210,*Harper v Appian*, 54 L T 383(e) *Goodman v Kine*, 8 Beav 379(f) *King v Smith*, 2 Ha 239,*Usborne v Usborne*, 1 Dick. 75 See*Hampton v Hodges*, 8 Ves 105,*Hippesley v Spencer*, 5 Madd 422,*Humphreys v Harrison*, 1 J & W 581,*Farrant v Lovel*, *sup*(g) *Leake v Beckett* 1 Y & J 339(h) *London and County Bank v Lewis*,

21 Ch D 490, C A

(i) *Beazley v Soares*, 22 Ch D 660

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assignees for the removal of fixtures, whether landlord's or tenant's, from the premises, though at the end of the term they are required to be all delivered to the lessor (*h*).

Sale of goods
in course of
business.

Where a bill of sale of a farm and stock contains an implied licence to the grantor to carry on the farm and sell the stock, a sale to a *bonâ fide* purchaser is binding on the grantee (*l*), but not if the sale is out of the ordinary way of business (*n*).

Growing
crops

A mortgagee who had taken possession after the bankruptcy of the mortgagor, was held to be entitled to an injunction to restrain the bankruptcy trustee from cutting and removing growing crops from the mortgaged lands (*n*).

(*h*) *Hitchman v Walton*, 4 M & W 409. See further as to fixtures, *ante*, pp 120 *et seq*.

(*l*) *National Mercantile Bank v Hampson*, 5 Q B D 177, *Walker v*

Clay, 49 L J C P 560. See *Moose v Shelley*, 8 App Cas 285, 290, J C

(*m*) *Taylor v McKeand*, 5 C P D 358.

(*n*) *Bagnall v Villas*, 12 Ch D 812.

CHAPTER XXXVII

OF THE RELATIVE RIGHTS OF MORTGAGORS AND MORTGAGEES
WITH RESPECT TO LESSEES AND TENANTS OF MORT-
GAGED LANDS.

i.—As to Leases, &c. subsisting at the Date of the Mortgage — Mortgagees takes subject to subsisting leases, &c.
The mortgagor can give to the mortgagee no better title than he has himself, and, consequently, the latter, by the mortgage conveyance, takes the property subject to all leases and tenancies subsisting at the date thereof

By the conveyance the reversion passes to the mortgagee, and with it the right to future rents and other rights incident to the reversion (*a*); but arrears of rent do not pass without express words (*b*) Mortgagee's right to rents

The tenant may, however, continue to pay the rent to the mortgagor so long as he is allowed by the mortgagee to receive it, for though the conveyance is effectual as to the mortgagee's rights against the tenant without any attornment (*c*) by the latter, the tenant is not prejudiced by payment of the rent to the mortgagor, or by breach of any condition for non-payment of rent before notice of the mortgage (*d*) Payment of rent to mortgagor

But if the tenant pay the rent to the mortgagor after notice to pay the mortgagee, and is afterwards compelled to pay the latter, the payment, being voluntary, cannot be recovered from the mortgagor (*e*)

Where the demise is either prior to the mortgage, or is made under a power in the mortgage deed, and therefore contemporaneous with it in point of effect (*f*), the notice of the mortgagee to the tenant in possession operates as an attornment at common law, having relation back to the time of the grant, and it follows that all the rents due from the tenant at the time of the notice, Effect of notice to pay rents to mortgagees.

(*a*) *Trent v Hunt*, 9 Exch 14, *Rogers v Humphreys*, 4 A. & E 299

(*b*) *Salmon v Dean*, 3 Mac & G

344
(*c*) 4 Anne, c 16, s. 9.

(*d*) *Ibid* s 10

(*e*) *Higgs v Scott*, 7 C B 63

(*f*) *Rogers v Humphreys*, 4 A. & E 269

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and not actually paid over to the mortgagor (*g*), and all subsequent rent, belong of right to the mortgagee, who may distrain or sue for them (*h*), or if the tenant holds from year to year, or under an agreement, may recover them in an action for use and occupation (*i*); and that, too, though the mortgagor has, after the mortgage, altered the property and raised the rent (*j*)

Distress by mortgagee.

The mortgagee, although the assignee of the reversion, cannot distrain or sue for rent accrued, or for breaches of covenant, prior to the assignment (*k*). If the assignment include in terms the previous arrears, still the mortgagee could not distrain (*l*), although he could recover the arrears like any other choses in action assigned to him

Parol tenancy

When a tenant under a parol contract assigns his interest, but the assignee is not accepted by the mortgagor, a subsequent mortgagee cannot sue the tenant, parol contracts not being incident to the reversion (*m*)

Notice to quit

If the land, at the time of the mortgage, be in the occupation of a tenant from year to year, he will be entitled to the usual notice to quit (*n*)

Liability of mortgagee on covenants
Anomalous position of mortgagor in possession before the Judicature Act

A mortgagee is not liable to affirmative covenants not running with the land, although he has notice (*o*)

Formerly, serious inconveniences attended the position of a mortgagor who was allowed to remain in possession of the mortgage lands as regards his remedies for enforcing payment of rent against persons holding under leases and tenancies subsisting at the date of the mortgage. Thus, the mortgagor, having conveyed away the legal estate, could not sue the tenant in ejectment (*p*), and he could only distrain by virtue of an implied authority from the mortgagee, which, apparently, the latter could at any time determine by notice (*q*).

(*g*) See 4 Anne, c 16, ss 9, 10

(*h*) *Moss v Gallimore*, 1 Doug 279, *Rogers v Humphreys*, 4 A & E 269

(*i*) *Buch v Wright*, 1 T R 378, *Rauson v Eicke*, 7 A & E 451, *Exp Hankey*, 1 M & McA 247

(*j*) *Burnous v Gidam*, 12 L J Q B 333 1 Dowl & L 313

(*k*) *Flight v Bentley*, 7 Sim 149, *Woodf L & T* 12th ed pp 236, 392, *Hunt v Remnant*, 9 Exch 635, *Johnson v St Peters*, 4 A & E 520, *Martin v Williams*, 1 H & N 817

(*l*) *Metrop Counties Soc v Broun*, 1 E & E 832

(*m*) *Alcock v Moorhouse*, 9 Q B D 366, C A

(*n*) *Buch v Wright*, 1 T R 378, 383

(*o*) *Haywood v Brunswick Building Soc*, 8 Q B D 403, C A

(*p*) *Marrutt v Edwards*, 5 B & Ad 1065

(*q*) *Trent v Hunt*, 9 Exch 14, *Snell v Finch*, 13 C B N S 657, 658, *Delaney v Fox*, 2 C B N S 774 See *SC*, 1 Smith's L C 10th ed 504, *The Dean of Christchurch v Duke of Buckingham*, 17 C B N S 413

Some of the difficulties of the mortgagor, whilst he was allowed to remain in possession by the mortgagee, have been removed by sect 25, sub-sect (5), of the Judicature Act, 1873 (r); by which it is thus enacted.

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Powers of mortgagor under the Judicature Act

“A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.”

Suits for possession of land, &c by mortgagors

Under the Act, until notice is given by the mortgagee, no action can be brought by him on the matters referred to in this sub-section; otherwise the same causes of action would vest in both the mortgagor and mortgagee at the same time.

A mortgagor may bring an action for an injunction in his own name to prevent a breach of a restrictive covenant by a tenant without making the mortgagee a party, unless his security is likely to be affected (s).

ii.—Leases granted by Mortgagors and Mortgagees jointly —

The concurrence of both the mortgagor and mortgagee is required for the demise of lands in mortgage, unless the lease is granted by the mortgagor alone in exercise of an express power of leasing contained in the mortgage, or in exercise of the statutory powers of leasing hereafter to be considered (t).

Concurrence of mortgagor and mortgagee generally necessary

If a mortgagor, who has parted with the legal estate in the land, and who has consequently an equity of redemption only, joins with his mortgagee in a lease of the premises, and the lessee enters into covenants with the mortgagor and his assigns, these covenants, being collateral to the land, will neither descend at common law to the heir of the mortgagor, nor pass to an assignee of the mortgagee under 32 Hen. VIII c. 34, but will be covenants in gross, on which actions must be brought in the name of the mortgagor or his personal representatives. This point was decided in *Webb v. Russell* (u), where it was held that an alteration of the reversion had taken place, for the mortgagor, being possessed of a term of ninety-nine years when he made the

Lessee's covenants with mortgagor are in gross

(r) 36 & 37 Vict c 66

(s) *Fairclough v Marshall*, 4 Ex D

(t) *Post*, p 685

(u) *Webb v Russell*, 3 T R 393

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lease of eleven years, afterwards purchased the reversion in fee and merged the term of ninety-nine years, so that the assignee of the reversion was not seised of the same estate in respect of which the covenants had been made

For the same reason that the covenants are in gross, the mortgagor, though the reversion is extinguished, may sue the lessee (*x*).

Covenant for quiet enjoyment by mortgagor

Conversely, if the mortgagor enters into the lessor's covenants for quiet enjoyment, &c, then, inasmuch as the legal estate is in the mortgagee, such covenants are covenants in gross only, and do not run with the land so as to bind the legal reversion. A covenant for quiet enjoyment from both lessors would, in the absence of any express covenant, be implied (*y*); but an express covenant by the mortgagor excludes such implication (*z*)

With whom lessee's covenants should be made

Where, therefore, a lease is made by a mortgagee and mortgagor, the lessee's covenants should always be made with the mortgagee as the owner for the time being of the legal estate; and when the mortgage is paid off and the estate is reconveyed to the mortgagor, the right to sue on such of the covenants as run with the land will pass to the mortgagor as incident to the reversion.

Effect of several covenants with mortgagor and mortgagee

On a demise by the mortgagee with the concurrence of the mortgagor, a covenant entered into by the tenant with them both severally to pay rent to the mortgagee until payment of the mortgage debts, and then to the mortgagor, is a covenant running with the land until the mortgage is discharged, and then becomes a covenant in gross; and during the continuance of the mortgage, it was held that the action was properly brought by the mortgagee alone, and that the payment of the mortgage money was a condition subsequent operating in defeasance of the covenant with the mortgagee, and must be pleaded (*a*); but in other cases (*b*) it was held that the action should be brought in the joint names.

Reservation of rent.

So, also, in leases by mortgagors and mortgagees, the rent should be reserved to the mortgagee, or generally, the effect of which will be that the benefit of such reservation will, on reconveyance, pass with the estate to the mortgagor

(*x*) *Stokes v Russell*, 3 T R 678;
Thwaites v. McDonough, 2 Ir Eq R 97

(*y*) *Coleman v Sherwin*, 1 Salk 137.

(*z*) *Noakes' Case*, 4 Rep 80, *Smith v Pocklington*, 7 Sc 69

(*a*) *Whitaker v. Harold*, 11 Q. B. 147.

(*b*) *Wakefield v Brown*, 9 Q B 209,
Magnay v Edwards, 13 C. B 479

A right of entry in a lease cannot be reserved to a stranger, and, therefore, if it appears on the face of the lease that the legal estate is in the mortgagee or a trustee for him, and the right of entry is reserved to the mortgagor, it will be void (c). CHAP XXXVII
Right of entry

A right of re-entry, however, being reserved to them, or either of them, in such joint lease, enures to the benefit of the person with the legal estate for the time being, to the mortgagee while his interest lasts, and to the mortgagor when his interest commences, but they cannot sue on a joint demise (d).

A joint lease by mortgagee and mortgagor operates as a lease by the mortgagee, and an equitable confirmation by the mortgagor, who is in law a stranger to the estate; so a covenant by the mortgagor cannot be implied as incident to the demise, and he cannot be sued jointly with the mortgagee (e). Operation of joint lease

Where a mortgagee of leaseholds joins with the mortgagor in leasing part of the premises, although for the residue of the term, and the rent and power of re-entry is reserved to the mortgagor, but it is provided that the rights of the mortgagee on the entirety of the estate are to remain unaffected, the mortgagee will in equity be entitled to the rent, but he will not be allowed to defeat the lease by his power of sale (f). Power of sale.

In an action of trespass against assignees in bankruptcy of the mortgagor, a replication that the bankrupt before his bankruptcy made an underlease by way of mortgage, and that before the bankruptcy it was agreed between mortgagor, mortgagee, and the plaintiff that the latter should have an underlease from the two former, under which the plaintiff entered, &c, was not objectionable on the ground of duplicity in pleading (g). Underlease.

iii.—Leases, &c. improperly granted by Mortgagor after the Mortgage—Independently of sect 18 of the Conveyancing and Law of Property Act, 1881 (h), which applies only in case of a mortgage made after the commencement of this Act, a mortgagor cannot, after the date of the mortgage, and in the absence of an express power in that behalf, or the concurrence of the Leases by mortgagor do not generally bind mortgagee.

(c) *Doe v Lawrence*, 4 Taunt 23,
Doe v Adams, 2 Cr & J 232, *Saunders*
v Merryweather, 3 H & C 902

(d) *Doe v Adams*, 2 Cr & J 232
See *Doe v Lawrence*, 4 Taunt 23

(e) *Smith v Pookington*, 7 Sc 69

(f) *Edwards v Jones*, 1 Coll 247

(g) *Pim v Grassbrook*, 2 C B 429

(h) 44 & 45 Vict c 41, s 18, set out
post, p 686

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mortgagee, create a lease or tenancy which will bind the mortgagee, and if he purports to create such a lease or tenancy, the mortgagee or his transferee may proceed to eject the lessee or tenant without notice (e)

Power for mortgagee to lease

As it was often one of the terms of the arrangement for a loan that the mortgagor should be able to grant leases independently of the mortgagee, an express power of leasing was frequently given to the mortgagor by the mortgage deed. The validity of a lease so granted will, of course, depend upon its having been made in strict compliance with the terms of the power.

Specific performance

The mortgagor not being able by himself to make a valid lease in the absence of an express power, it was held that, in order to enforce specific performance of an agreement for a lease, he must have obtained a prior reconveyance from the mortgagee, or procured the latter to concur in the lease (h). In that case, it seems to have been considered that the tenant could not, under an agreement for a lease, compel the mortgagor to redeem for the purpose of granting a valid lease, on the principle that specific performance will not be decreed where it is unreasonable to do so (i)

Notice to quit

Notice to quit is not necessary in an action against a tenant subsequent to the mortgage, though the mortgagee covenants not to take possession without twelve months' notice (m); and after default in payment of the mortgage money, the mortgagee may treat such tenant as a trespasser (n)

Right to emblements

On the eviction of the lessee he is not entitled to *emblements*; the point was started in *Keech v Hall* (o), but did not call for a decision, the Court only remarking that the right to emblements would be no bar to the mortgagee's recovering in ejectment; it would only give the lessee a right of ingress and egress to take the crops. It may, however, be considered that, both on legal and equitable principles, the lessee will not be entitled to emblements, for at law he is evicted by title paramount, and the law makes a distinction as to the right to

(e) *Doe v Marsey*, 8 B & Cr 767, *Thunder v Belcher*, 3 East, 449, *Rogers v Humphreys*, 4 A & E 299, *Evans v Elliott*, 1 P & D 264, *Cadle v Moody*, 7 Jur N S 1249, *Gibbs v Cruikshank*, L R 8 C P 454.

(h) *Costigan v Hastler*, 2 Sch & L 160

(i) See *Watson v Marston*, 4 De G M & G 230, 239

(m) *Doe v Davies*, 7 Exch 89.

(n) *Gibbs v Cruikshank*, L R 8 C P 454

(o) 1 Doug 21.

emblements, between tenants who have particular estates that are uncertain, defeasible by the act of the parties to the original contract, or by the act of God, and those who have particular estates defeasible by a right paramount; for, in the latter case (*p*), "he that hath the right paramount shall have the emblements; for although *quoad actionem* the law will not by a fiction make the lessee who comes in by title liable to punishment as a trespasser, yet *quoad proprietatem*, the regress of the disseisee reverts the property as well for the emblements as for the freehold itself, and equally against the feoffee or lessee of the disseisor, as against the disseisor himself For the rule and reason of the law is, that after the regress of the disseisee, the law adjudges that the freehold has continued in him which rule and reason extends as well to the emblements as to the freehold, and although the act of the disseisor may alter a man's action, yet his act cannot take away his action, property, or right" (*q*).

Nor if the tenancy determines by the act of the lessee, will he be entitled to emblements (*r*); and, therefore, it was decided that if a lease be granted subject to a condition of re-entry on bankruptcy, insolvency, or by the lessee incurring a debt on which judgment shall be entered up, and the lessor re-enter for condition broken, the latter will have a right to the emblements (*s*).

A mortgagee is not entitled to arrears of rent which have accrued due up to the time of his taking possession, whether the property was, up to that time, in possession of the mortgagor himself (*t*), or his trustee in bankruptcy (*u*), or any other person claiming under him (*x*). And this rule applies not only to a mortgagee in fee, but also to a mortgage of a term (*y*), or of a life estate (*z*).

Right to arrears of rent

A mortgagee entering into possession is not disentitled by the Apportionment Act, 1870 (*a*), from demanding and receiving current rent becoming payable after entry (*b*). But he is

Current rents not apportioned

(*p*) Co Int 55 b
 (*q*) *Lafford's Case*, 11 Rep 46, 51
 (*r*) *Bulwer v Bulwer*, 2 B & Ald
 470
 (*s*) *Davis v Eyton*, 7 Bing. 154
 (*t*) *Drummond v Duke of St Albans*,
 5 Ves 438, *Higgins v York Buildings*
Co, 2 Atk 106
 (*u*) *Exp Wilson*, 2 V & B 252

(*x*) *Hall v Lord Berley*, 20 Beav.
 127, *Fught v Camac*, 25 L J (N S)
 Ch 654
 (*y*) *Gresley v Adderley*, 1 Swanst
 573.
 (*z*) *Coleman v Duke of St Albans*,
 3 Ves 25
 (*a*) 33 & 34 Vict c 35
 (*b*) *Anderson v Butten's Wharf Co*,
 48 L J Ch. 824.

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Warehousing
rents

Action for
mesne profits
against lessee

not entitled to so-called rents due to the mortgagors for warehousing goods, though recoverable under statute of distraint and sale of the goods (c)

As to mesne profits, the remedy is by an action, formerly the action of trespass *vi et armis*, and in this respect, a distinction is taken between a disseisor and one who comes in under him by title (d); for if a man were disseised, and the disseisor, during the disseisin, cut down the trees, or grass, or the corn growing upon the land, and afterwards the disseisee re-entered, the disseisee had an action of trespass against him *vi et armis* for the trees, grass, corn, &c; for after the regress, the law, as to the disseisor and his servants, supposes the freehold always continued in the disseisee. But if the disseisor made a feoffment in fee, gift in tail, lease for life or years, and afterwards the disseisee re-entered, he had not trespass *vi et armis* against those who came in by title, for this fiction of the law, that the freehold continued always in the disseisee, had not relation to make him who came in by a title a wrong-doer *vi et armis*, because in *fictione juris semper æquitas existit*. But in such case, the disseisee might recover all the mesne profits against the disseisor. Now it might be thought that the lessee who came in under the mortgagor in possession was within the rule, and consequently not liable to an action for mesne profits; though according to *Pope v. Biggs* (e), the lessee was liable to such an action on ejectment by the mortgagee for rents due at the time when notice of the mortgage was given and not then paid over to the mortgagee; but payments by the tenant to his landlord, the mortgagor, before the rent is due, are not protected (f).

Actual
possession of
mortgagee
necessary.

The mortgagee cannot bring an action of trespass for mesne profits against the tenant, or waive the tort and sue in use and occupation, unless he has been in actual possession of the land, or unless the tenant is estopped from denying the possession by a verdict, or has suffered judgment by default in ejectment (g).

Remedy of
ejected tenant
against
mortgagor

The mortgagor, after disturbance by the mortgagee, will be liable to his tenant in an action for damages on his covenant for quiet enjoyment (h); and the lessee's right to sue is not affected

(c) *Anderson v. Butler's Wharf Co.*, 7 C P 132
48 L J Ch 824

(d) *Lifford's Case*, 11 Rep 46, 51

(e) 9 B & Cr 245

(f) *De Nicholls v. Saunders*, L R
5 C P. 593, *Cook v. Guerra*, L R

(g) *Turner v. Cameron's Coalbrook
Steam Co.*, 5 Exch 932, *Litchfield v.
Ready*, 5 Exch 939

(h) *Costigan v. Hastler*, 2 Sch & L.
160, *Howe v. Hunt*, 31 Beav. 420

by the circumstance of his having obtained from the mortgagee compensation for improvements (i). CHAP XXXVII

If the mortgagee refuses to adopt a lease, or agreement for a lease, made without his consent by the mortgagor, whether or not he proceeds to evict the lessee, yet the lease, being a valid demise of the equity of redemption, will entitle the lessee to redeem the mortgage (j), and will at all events be binding on the mortgagor, and all persons claiming under him.

The mortgagee may elect not to eject the lessee, and may confirm the tenancy, or rather establish a new tenancy upon the same terms (k); and any act of the mortgagee demonstrating an approbation of the lease, such as the receipt of or distress for rent, or notice to quit (l), or the like, will be evidence of a tenancy, and a demand by the mortgagee or his agent, and payment by the tenant of interest of the mortgage instead of rent will suffice (m). Confirmation of leases, &c by mortgagee

If the mortgagee encourages the lessee to lay out money on the premises, he will not afterwards be permitted to disavow the tenancy (n); but mere inspection by the mortgagee of the improvements will not amount to acceptance of the lessee as his tenant (o).

The mortgagee does not, by making the lessee his tenant, set up a lease for the term, but only creates a tenancy from year to year (p). So, if the mortgagee asserts his paramount title by giving to a lessee or tenant notice to pay the rents to him, the lessee of the mortgagor, subsequent to the mortgage, may consider himself as tenant from year to year of the mortgagee, and determine his tenancy with the mortgagor, notwithstanding that he has in the meantime paid rent to the mortgagee pursuant to the notice (q). Tenancy from year to year created

If the tenant should refuse to pay the rents due at the time of the notice (i), and in the absence of any other circumstances from which a tenancy can be inferred, such notice by the mortgagee is not of itself sufficient to make the lessee his Distress by mortgagee

(i) *Carpenter v Parker*, 3 C B N S 206.

(j) *Tarn v Turner*, 39 Ch. D 456, C A

(k) *Keech v Hall*, Doug 21.

(l) *Smith v. Eggington*, L R 9 C P 145

(m) *Doe v Cadwallader*, 2 B & Ad 473, *Doe v Hales*, 7 Bing 322

(n) *Keech v. Hall*, 1 Doug 21, *Evans*

v Elliott, 1 P. & D 256.

(o) *Doe v Hughes*, 11 Jur 698

(p) *Doe v. Bucknell*, 8 C & P 566, *Partington v Woodcock*, 5 N & M 672

(q) *Corbett v Plowden*, 25 Ch D 678, C A

(r) In the Law Magazine for November 1836, an able article will be found on the respective rights of mortgagee and mortgagor for recovery of rents

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tenant, so as to enable him to distrain or sue for the rent afterwards accruing due under the lease (*s*)

The mortgagee cannot distrain on a tenant of the mortgagor under a lease made after the mortgage, unless the tenant has expressly or impliedly attorned (*t*); and notice by the mortgagee to the tenant of the mortgagor under such a lease does not of itself constitute the relation of tenant to the mortgagee, or entitle the latter to distrain for the subsequent rent (*u*). A subsequent payment of rent will not act by way of relation back to establish a distress for previous rent (*u*); there must be an attornment or other evidence of consent by the tenant (*x*)

New tenancy
between
mortgagee
and tenant of
mortgagor.

A new tenancy may be created between the mortgagee and tenant by payment and acceptance of rent, as rent (*y*), or even by the acquiescence of the tenant in the notice to pay the rent to the mortgagee (*z*), which will, it seems, be a tenancy from year to year upon the terms of the lease (*a*), although mere notice by the mortgagee to the tenant to pay the rents to him, without attornment or assent on the part of the tenant, is insufficient to create a new tenancy (*b*). But it would seem that a notice by the mortgagee to pay all future rents to him may be treated by the tenant, as against the mortgagor, as an eviction by title paramount; and it was accordingly held in *Waddilove v. Barnett* (*c*), that under an issue of non-assumpsit the defendant (the tenant) could, as to the rents due after the notice, give such notice in evidence, though as to the rents due prior to such notice, the notice must have been specially pleaded (*d*).

It seems to be open to the tenant to treat the payments made to the mortgagee in consequence of the notice as payments made on the mortgagor's account, and to plead the same accordingly, without denying the mortgagor's title as landlord (*e*).

(*s*) *Evans v. Elliott*, 9 A. & E. 342, *Townson v. Jackson*, (1891) 2 Q. B. 484, C. A.

(*t*) *Evans v. Elliott*, *sup.*, *Rogers v. Humphreys*, 4 A. & E. 299.

(*u*) *Partridge v. Woodcock*, 5 N. & M. 672, *Rogers v. Humphreys*, *sup.*, *Evans v. Elliott*, *sup.*

(*x*) *Wheeler v. Branscombe*, 5 Q. B. 375, *Doe v. Thompson*, 9 Q. B. 1037.

(*y*) See *Rogers v. Humphreys*, 4 A. & E. 313, *per* Lord Denman, C. J.

(*z*) *Brown v. Storey*, 1 Man. & Gr. 117.

(*a*) *Doe v. Boulter*, 6 A. & E. 675, *Brown v. Storey*, *sup.*

(*b*) *Evans v. Elliott*, 9 A. & E. 342. And see 6 A. & E. 695.

(*c*) 2 Bing. N. S. 538.

(*d*) And see *Doe v. Barton*, 11 A. & E. 315, and the judgment in *Gouldsworth v. Knights*, 11 M. & W. 337, and *Mayor and Burgesses of Poole v. Whitt*, 15 M. & W. 571.

(*e*) *Johnson v. Jones*, 9 A. & E. 809, though in this case the rent was due before the notice.

If the mortgagee recognize the lessee as his own tenant, or as being in lawful possession of the premises at a given time, it is not competent for him to say afterwards that he was at that time a trespasser (*f*). CHAP XXXVII.

And in *Evans v. Elliott*, Lord Denman said that he was by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold from the circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises as before the mortgage, and to lease them out exactly as if his property in them continued (*g*).

In *Pope v. Biggs* (*h*), the Court of King's Bench decided that the tenant in possession under a demise subsequent to the mortgage was justified in paying the rent to the mortgagee due at the time of the notice and demand made, on the ground that as the mortgagee might have evicted the tenant, and obtained the rents due in an action for mesne profits, the mortgagee must be entitled to receive them without bringing an ejectment.

Where a mortgagee gives notice to tenants, but does not take possession, any loss arising to the mortgagor therefrom will fall on the mortgagee (*i*); but if the mortgagee, after he has taken possession, refuses to apply for rent, the mortgagor has no remedy in equity; his only remedy is against the mortgagee on taking the accounts (*k*).

As a tenant cannot dispute his landlord's title, the lease by the mortgagor after the mortgage will be good until the mortgagee interferes, until which time the mortgagor may receive the rent to his own use, and may distrain for it (*l*), even after the mortgagee has given notice to the tenant to pay, but before he has paid, and the tenant before the Judicature Act would have had no defence (*m*); but *semble*, it would be otherwise now; the tenant, however, after such notice, is quite justified in giving up the premises to the mortgagee (*n*). In *Wilton v.*

Lease by mortgagor is voidable, not void

(*f*) *Burch v. Wright*, 1 T R 383, *Doe v. Hales*, 7 Bing. 322. And see *Doe v. Olley*, 12 A & E 481, *Doe v. Goodier*, 10 Q B 957.

(*g*) 9 A & E 355, *quære*, however (*h*) 9 B & C 245. And see *Johnson v. Jones*, 9 A & E 809.

(*i*) *Heales v. McMurray*, 23 Beav. 401.

(*l*) *Salmon v. Dean*, 14 Jur 235, reversed on other points, 3 Mac & G 344.

(*l*) *Trent v. Hunt*, 9 Exch 14.

(*m*) *Per Williams, J.*, in *Carpenter v. Parker*, 3 C B N S 206.

(*n*) *Carpenter v. Parker*, 3 C B N S. 206.

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Dunn (o), it was held that it was not sufficient for the tenant to show a notice and claim by the mortgagee; he must prove payment; but payment of rent by a tenant to the mortgagee after notice and on compulsion is valid (p)

Nor is the tenancy under the mortgagor affected by an authority from the mortgagor to the mortgagee to receive the rents, though perhaps such a power may be irrevocable and justify all payments made under it while the mortgage debt continues (q).

Estoppel.

After the lessee has been compelled to pay the mortgagee, he still, in defending himself against the mortgagor, must admit the latter's title, and show that it has determined (r); or if the payment were with the mortgagor's consent, the plea might have been *rien en arri re* (s); but such payment of rents due at the time of the notice must, in an action by the mortgagor, have been and still must be specially pleaded (t). So if the rent has become due, and is not paid to mortgagee or mortgagor, any binding agreement between them for payment of rent to the former must have been, and must be still, specially pleaded by the tenant (u).

But though the tenant will thus be allowed all payments to the mortgagee made under compulsion, or with the assent of the mortgagor, he could not, in an action brought against him by the latter, plead what amounted to *nil habuit in tenementis* (x), though he might show that the mortgagor's interest had determined by eviction by the mortgagee (y).

Of course a lessee claiming under the mortgagor subsequently to the mortgage may, in answer to an action by the mortgagee, show eviction by title paramount; or, if the lease be prior in date to the mortgage, it would seem that he may either make the same defence of eviction by title paramount, or without showing any eviction, plead that by reason of the paramount

(o) 17 Q B 294. See *Hickman v Machin*, 4 H & N 716, *Salmon v Dean*, 3 Mac & G 344.

(p) *Johnson v Jones*, 9 A & E 809. See *Brown v Storey*, 1 Man & Gr 117, *Hickman v Machin*, *sup*, *Underhay v Read*, 20 Q B D 209, C A.

(q) *Wheeler v Branscombe*, 5 Q B 375.

(r) *Alchorne v Gomme*, 2 Bing 54, *Doe v Edwards*, 5 B & Ad 1065, *Taylor v Zamra*, 6 Taunt. 524, *John-*

son v Jones, *sup*.

(s) *Dyer v Bowley*, 2 Bing 94, *Wheeler v Branscombe*, 5 Q B 375, 377.

(t) *Waddelove v Barnett*, 2 Bing N.C. 538.

(u) *Wheeler v Branscombe*, *sup*.

(x) *Alchorne v Gomme*, 2 Bing 54. And see *Johnson v Jones*, 2 P. & D. 651.

(y) *Doe v. Barton*, 11 A. & E. 307.

title the mortgagor could not transmit any legal title to the mortgagee (z); and notice given by the person having such paramount title to the tenant, to pay the rent to him, is, it seems, evidence to go to a jury of the fact of eviction (a). And if, prior to 3 & 4 Will. IV. c. 74, which abolished fines and recoveries, the mortgagor, being tenant in tail, had mortgaged his estate, and afterwards levied a fine, or suffered a recovery to other uses, it would, nevertheless, have let in the mortgage (b); and since the passing of that statute, the mortgage of a tenant in tail will be also let in by his deed duly enrolled in pursuance of the statute, except as against a *bond fide* purchaser without express notice (c).

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A tenant is not estopped from disputing the title of an unadmitted mortgagee of copyholds, because estoppel will not operate upon an equitable estate (d).

Where a lease was made by the mortgagor to which the mortgagee was not a party, but in which the mortgage was recited, and the mortgagor, after assignment, brought an action on the covenant for rent, it was held that the covenants were in gross, and that it might be well averred in the declaration that the plaintiff had no reversion at the time of the demise, and that a plea "that the reversion was in the plaintiffs at the time of the demise, and that before breach the plaintiffs had assigned it to a third person," was bad; as whatever might be the law otherwise, there was no estoppel in the present case, by reason of the disclosure of the facts on the face of the lease (e).

Whether indeed, in ordinary cases, when there is nothing on the face of the lease to prevent the estoppel, the assignee of a lessor, who had only an equity of redemption, or had no interest in the premises demised, can maintain an action on the covenant or distrain against the lessee, or whether the estoppel ceases as between them, is a point on which the cases are not agreed. In the case of *Gouldsworth v. Knights* (f), the Court of Exchequer held that the assignee had a good title by estoppel

Whether assignee of mortgagor can sue tenants

(z) *Doe v. Barton*, 11 A. & E. 307. This latter ground, although taken in the judgment alone as the ground of defence for the particular defendant (Barton), is questionable, since the case of *Gouldsworth v. Knights*, 11 M. & W. 337.

(a) *Doe v. Barton*, *sup*.

(b) See *sup* p. 374.

(c) See 3 & 4 Will. IV. c. 74, s. 38.

(d) *Rayson v. Adcock*, 9 Jur. N. S. 800, *Doe v. Webber*, 3 Bing. N. C. 922.

(e) *Fargeter v. Harris*, 7 Q. B. 708, *The Mayor and Burgesses of Poole v. Whitt*, 15 M. & W. 571.

(f) 11 M. & W. 337.

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against the tenant, and might distrain for the rent, though the case was decided on a different point. But this opinion of the Court is not easily reconcilable with the doctrine laid down in other cases (*g*).

It seems, however, to be settled, that if the reversion by estoppel in the lessor is afterwards fed by a conveyance of the legal estate, the lease thereupon becomes a legal lease, and an assignee of the lessor is an assignee of the reversion on the lease within 32 Hen. VIII c 34 (*h*). Although this doctrine seems to be in direct opposition to the earlier case of *Whitton v Peacock* (*g*), where, on the like principle as that on which the Court of King's Bench decided the first point in *Webb v. Russell* (*i*) against the plaintiff, viz., the alteration of the estate in reversion, the Court of Common Pleas decided, that if a lessor having only title by estoppel makes a demise of copyholds, and subsequently takes a surrender of the legal estate, and is admitted, his assignee of the reversion cannot sue the lessee on the covenants in the lease (*k*).

It is provided by statute (*l*), that when the reversion expectant on a lease, made either before or after the passing of the Act, of any tenements or hereditaments of any tenure, shall, after the 1st of October, 1845, be surrendered or merged, the estate, which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease

Generally the assignee of the mortgagor can sue the tenant, though the lease is subsequent to the mortgage, as the lease operates by way of estoppel (*m*); but where the lease shows the mortgage there is no estoppel (*n*). And as against the assignee of the mortgagor, the tenant may show that the assignee could not have a derivative title from the mortgagor, and he would

Right of
and against
assignee of
mortgagor

(*g*) *Whitton v. Peacock*, 2 Bing N C 411; *Carvick v Blagrove*, 1 B & B 531, *Doe v Barton*, 11 A & E 307. And see the judgment in *Pargeter v Harris*, 7 Q B 708, and in *Webb v Austin*, 8 Sc N R 419.

(*h*) *Webb v Austin*, *sup.*; *Sturgeon v Wingfield*, 15 M & W 224.

(*i*) 3 T R 393.

(*k*) *Whitton v Peacock*, 2 Bing N C 411.

(*l*) 8 & 9 Vict c 106, s. 9.

(*m*) *Cuthbertson v Irving*, 6 H & N 135, Exch Ch.

(*n*) *Saunders v Merewether* (or *Merryweather*), 3 H & C 902.

not be concluded from doing so by payment of rent to the assignee under a mistake of facts (o) CHAP XXXVII

Where the assignee of the mortgagor acquires the legal estate from the mortgagee, who was not privy to or estopped by the lease, the assignee will not be bound by it (p).

An underlease by the mortgagor passes no legal interest (q) Underlease

Where the mortgagor lets the premises furnished, the furniture not forming part of the mortgage, the mortgagee can only recover an apportioned rent (r) Lease of house and furniture

iv.—Leases by Mortgagors under Express Powers.—As formerly neither the mortgagor nor the mortgagee alone could make a lease which would be binding on the other(s), it was often thought advisable to enable the mortgagor to grant leases independently of the mortgagee by giving him a power of leasing (operating by way of appointment); and in the case of a lease operating under such a power, it was not material with whom the lessee's covenants were entered into, as the law annexed the benefit of the covenants to the legal reversion (t). Powers of leasing

According to this view of the legal doctrine, it was needless to impose upon the mortgagor any stringent conditions as to the form of the lease, as if the lease operated under the power, the benefit of the covenants and condition of re-entry as well as the rent were *ipso facto* annexed to the reversion, and therefore available by the mortgagee, his heirs and assigns; and if the lease did not operate under the power it merely took effect by estoppel as between the lessor and lessee, and did not bind the mortgagee or those claiming under him. The lease was, according to the usual practice, framed so that it might be unmustakeably an exercise of the power (u)

v.—Leases by Mortgagors under Statutory Powers.—As regards leases made by a mortgagor where the mortgage was Leasing powers of mortgagors

(o) *Doe v Barton*, 11 A. & E 307
And see the judgment in *Gouldsorth v Knights*, 11 M & W 337, and in *The Mayor and Burgesses of Poole v Whitt*, 15 M & W 571, *Pope v Biggs*, 9 B & Cr 245, and *Waddilove v. Barnett*, 2 Bing N C 538.
(p) *Doe v Thompson*, 9 Q B 1037, *Doe v Edwards and Others*, 5 B & Ad.

1065
(q) *Doe v Ongley*, 20 L. J C P 26
(r) *Dubutofte v Ourteaux*, Cro. Jac 453, *Salmon v Mathews*, 8 M & W 827
(s) *Supra*, p 673.
(t) *Greenaway v Hart*, 14 C B 340
(u) *Yellowly v Gower*, 11 Exch 274

CHAP XXXVII.

and mort-
gagees in pos-
session since
1st January,
1882.

made on or after the 1st January, 1882, the Conveyancing and Law of Property Act, 1881 (x), enacts as follows —

Sect. 18 —“(1) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

“(2) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid

“(3) The leases which this section authorizes are—

(i) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii) A building lease for any term not exceeding ninety-nine years.

“(4) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

“(5) Every such lease shall be made to take effect in possession not later than twelve months after its date.

“(6) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken

“(7) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

“(8) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall in favour of the lessee and all persons deriving title under him, be sufficient evidence

“(9) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect, within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute within that time, on the land leased, an improvement for or in connexion with building purposes

“(10) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term

“(11) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee, but the lessee shall not be concerned to see that this provision is complied with

“(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

"(13) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained

"(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing, and any further or other powers so reserved or conferred shall be exercisable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

"(15) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed

"(16) This section applies only in case of a mortgage made after the commencement of this Act, but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement

"(17) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting."

This section removes, in cases to which it applies, the disability which formerly prevented mortgagors in possession from granting leases and entering into and enforcing contracts for leases without the consent of their mortgagees.

Effect of
sect 18

The conditions annexed to an exercise of this statutory power must be strictly observed, as otherwise the lease will be void, as under the old law, as against the mortgagee (*y*), and will only operate as between the mortgagor and the lessee by estoppel (*z*)

Land, as defined for the purposes of this Act, unless a contrary intention appears, includes land of any tenure and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share of land (*a*).

Sub-sect (1)
Definition of
land

A lease by a mortgagor under this section may apparently confer, so as to bind the mortgagees, rights of light or other easements over adjoining land (*b*).

Demise of
easements.

(*y*) See *Yellowly v Gower*, 24 L J. N S 289, 11 Exch 274.

(*z*) See *ante*, p 682

(*a*) *Ibid* s 2 (ii.)

(*b*) *Wilson v. Queen's Club*, (1891) 3 Ch 522.

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Leases by
limited owner
of mortgaged
lands.

Although the above definition of land does not extend to "any estate or interest in land," it is conceived that tenants for life and other limited owners who have mortgaged their interests may, without the consent of their mortgagees, grant leases of the settled lands under this section which will be valid, at all events, until the determination of the limited interest if such should happen before the expiration of the term.

Powers of
leasing under
5 L Act,
1882, s. 50.

And by sect. 50 (3) of the Settled Land Act, 1882 (c), it is enacted that—

"Unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act."

A mortgagee is not bound by any agreement collateral to the lease made between the mortgagor and his lessee (d).

Sub-sec (2).
Leases by
mortgagees in
possession

Sub-sec. (2) of sect 18 of the Act of 1881 empowers mortgagees in possession to grant leases of the mortgaged lands in accordance with the provisions contained in the following subsections. This question will be considered later (e).

Sub-sec (3).
No power to
grant mining
leases

Mortgagors are not empowered under sect 18 to grant mining leases of the mortgaged land, inasmuch as such leases involve the abstraction of *corpus* of the property so as prejudicially to affect the security. But the provisions of the section, with such modification as may be necessary, may be extended by the terms of the mortgage deed so as to enable a mortgagor to grant mining leases (f). It will be observed that mining leases are not excepted from the statutory power of leasing given by the Settled Land Act, 1882, to limited owners of settled lands which are in mortgage (g).

Sub-sec (6).
Best rent to
be reserved.

Sect. 18 requires the lease to reserve the best rent that can reasonably be obtained. In estimating what is the best rent in each case, the particular circumstances must be regarded as a whole, and if the lease was granted in good faith and between independent contracting parties, the Court would not interfere unless satisfied that the inadequacy was substantial (h).

(c) 45 & 46 Vict c 38.

(d) *Municipal Permanent Investment Building Soc v Smith*, 22 Q B D 70, C A

(e) See *post*, p 800

(f) See Conv Act, 1881, s. 18, sub-ss (13) and (14), *sup*

(g) *Sup*

(h) *Duchess of Sutherland v Duke of Sutherland*, (1893) 3 Ch 169, 193.

In a lease granted under this section the lessee's covenants will be made with, and the power of re-entry will be given to, the mortgagor, but the benefit thereof will be annexed to the actual legal reversion, thus vesting in a legal mortgagee all remedies for recovery of rent and enforcing the covenants and the right of re-entry as if he had joined in granting the lease (i), so also the lessee will be entitled to the benefit of all covenants in his favour entered into by the lessor-mortgagor as against the mortgagee as owner of the legal reversion (l)

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Sub-sect (7)
Covenants
and condition
of re-entry

The mortgagor must deliver to the mortgagee a counterpart within one month after making the lease (l). If the mortgage is of an undivided share of land, and the mortgagor concurs with the other co-owners in granting a lease under this section, he must either obtain their consent to the delivery of the counterpart to the mortgagee or he must obtain a duplicate counterpart from the lessee. If a counterpart has been executed by the lessee, the non-delivery thereof to the mortgagee will not prevent the lease from being binding on the mortgagee in favour of the lessee, who is not concerned to see that the counterpart is delivered to the mortgagee (l), but the lessee and those claiming under him will be protected by production of the lease executed by the lessor. The Court would probably decree specific performance of the obligation to deliver the counterpart, and it would seem that the omission to deliver the counterpart would be such a breach of a provision of this Act as to render exerciseable the statutory power of sale conferred by this Act (m)

Sub-sect (8)
Delivery of
counterpart

For the purposes of the Act, "building purposes include the erecting and the improving of, and the adding to and repairing of, buildings; and a building lease is a lease for building purposes or purposes connected therewith" (n). Sect 18, sub-sect (9), of the Act, by enacting that building leases shall be made for the considerations therein mentioned (which are in effect considerations that the lessee shall carry out building purposes), seems impliedly to allow that such considerations may be regarded in fixing the best rent. If it is desired that the mortgagor shall not be able to grant under his statutory power

Sub-sect (9)
Building
leases

(i) See Conv Act, 1881, s 10

(k) *Wilson v Queen's Club*, (1891) 3
Ch 522

(l) Conv Act, 1881, s 18, sub-s (11)

(m) *Ibid* s 20(n) *Ibid* s 1 (x)

CHAP XXXVII

a valid lease, reserving for five years a comparatively low or even nominal rent in consideration of the lessee having carried out, or undertaking to carry out, building operations involving large capital expenditure on his part, a contrary intention must be expressed in the mortgage deed under sub-sect (13).

Repairing
lease

The consideration of "having repaired buildings" will not be satisfied by part repairs effected by the lessee without any binding obligation or contract on his part (o).

Sub-sect (13).
Contrary
intention

It is not unusual in practice to insert in mortgages a proviso excluding or modifying the provisions of this section, on the ground that the powers thereby conferred upon mortgagors are unduly extensive

Where it is intended to exclude the operation of this section, this should be done in express terms, and not merely by giving different powers of leasing to the mortgagor, which might be construed as collateral to and not in substitution of the statutory powers

If the operation of the section is simply negatived, the concurrence of the mortgagee in leases will be required, as was the case before the passing of the Act.

Execution of
mortgage
deed by
mortgagee to
entitle him
to benefit of
contrary
intention.

Sub-sect. (13) requires that the contrary intention should be expressed not merely in the mortgage deed, but "by the mortgagor and the mortgagee in the mortgage deed, or otherwise in writing." The words "by the mortgagor and the mortgagee" would seem to be superfluous, unless it is intended that, where contrary intention is expressed, the mortgage deed shall be executed by the mortgagee. Even independently of this requirement, it would seem that the mortgagee ought in such case to execute the mortgage deed. No doubt the execution of the deed by the mortgagor alone would bind him, as between himself and the mortgagee, not to grant such a lease, and the mortgagee, although he had not himself executed the deed, might restrain the mortgagor from doing so; but it seems doubtful whether, after the lease had been granted, the mortgagee, unless he had executed the mortgage deed, could treat the lease as void as against a person who was not a party to that deed and had taken his lease *bonâ fide* and without notice that the mortgagor's statutory powers of leasing had been therein expressed to be excluded

The effect of sub-sect (15) is to render the powers of leasing conferred by this section inapplicable, except by licence of the lord, to copyholds in manors where there is no custom to lease without such licence

CHAP XXAVII
Sub-sect (15)
Leases of
copyholds

The powers of leasing given by sect 18 apply to mortgages made after, but in pursuance of agreements made before, the commencement of this Act So where an agreement for a mortgage made before the commencement of the Act provided that a mortgage should be executed containing a power of sale and all other "usual clauses," it was held that the mortgagor was not entitled to have the operation of this section excluded (p)

Sub-sect (16)
Mortgage
after the Act
under agree-
ment

The words "so far as circumstances admit" apparently render inapplicable to parol agreements sub-sect (7), as to covenant for payment of rent and condition of re-entry, and sub-sect (8), as to delivery of a counterpart, and also permit an agreement to pay rent to be substituted for a covenant in agreements in writing not under seal for leasing or letting.

Sub-sect (17)
Parol leases
and tenancies

(p) *Re Nugent and Riley's Contract*, 49 L T 132

CHAPTER XXXVIII

OF REDEMPTION.

SECTION I

OF THE RIGHT TO REDEEM GENERALLY

Right to
redeem in-
herent to
mortgage

i.—Who are entitled to redeem—It has been seen that the right of redemption is inherent to and inseparable from a mortgage transaction, whether, as is usually the case, the right is vested in the mortgagor by an express proviso to that effect contained in the mortgage deed, or whether it is to be reasonably inferred from the circumstances of the transaction that the instrument was intended to operate by way of security, and not as an absolute conveyance (*a*). This inherent right is, however, enforceable only by the persons, subject to the conditions, and in the manner hereafter stated

No redemp-
tion where
conditional
sale

If the transaction be by way of sale, but reserving to the vendor a right of repurchase within a limited time or in a certain event, it is not a mortgage, and if the condition of repurchase is not strictly complied with, the grantee's title will become absolute so as to deprive the grantor of any right of redemption (*b*).

Title to re-
deem must be
shown

It is a general principle that no person shall be entitled to redeem but he who can show a title to the estate of the mortgagor (*c*), for the mortgagee is entitled to hold the property against all persons who cannot clearly establish their title to the equity of redemption (*d*). So where a person claiming under the heir general sought to redeem a mortgage

(*a*) See *ante*, p 11

(*b*) *Goodman v Grerson*, 2 Ba & Be 278, *Williams v Owen*, 5 My & Cr 303, *Ferry v Meadowcroft*, 4 Beav 202, *Alderson v White*, 2 De G & J 97 As to conditional sales, see *ante*,

p 19

(*c*) *Lomax v Burd*, 1 Vern 182, *Buckley v Dorrington*, and *Monk v Pomfret*, 2 Eq Ca Abr 605, pl 39, *James v Biou*, 3 Swanst 237.

(*d*) See *Tyson v Cox*, T & R 395.

on the fee, and the mortgagee by his answer set up a deed of entail entitling another person to the equity of redemption, it was held that the plaintiff could not be admitted to redeem even at his own peril (e)

As a general rule, the mortgagor and all persons having any interest in the equity of redemption are entitled to redeem

Persons entitled to redeem

It has been seen that if the mortgage is of renewable leaseholds, and the mortgagee obtains a renewal, the mortgagor will be entitled to the benefit of the new term, and will have the right to redeem and enjoy the term free from the mortgage (f)

Mortgagor of renewable leaseholds

One of several joint tenants or tenants in common of the equity of redemption is entitled to redeem subject to accounts as between himself and his co-owners (g)

One of several co-mortgagors may redeem,

A co-mortgagor is, however, not entitled or compellable to redeem his part only of the mortgaged property, but must redeem the whole, subject, as between himself and his co-mortgagors, to his right of contribution in respect of the amount paid by him to redeem the mortgage and to the rights of all other persons interested in the equity of redemption (h)

—but must redeem whole

So, also, if two estates are comprised in the same mortgage, the owner of the equity of redemption of one of the estates cannot claim or be compelled to redeem that one apart from the other, his right being to redeem the whole property comprised in the mortgage, subject to the equities of other persons interested (i)

Two estates subject to same mortgage must be redeemed together.

A mortgagor who has absolutely assigned the equity of redemption cannot bring an action for redemption (k).

The assignee of the equity of redemption may also redeem, although the equity has been abandoned for a considerable time. Of this an instance frequently referred to is to be found in a case before Lord Hardwicke (l), in which a person who is there styled a prowling assignee, bought in, for a very inconsiderable sum, an equity of redemption which had been abandoned for fifteen years. The Court decreed a redemption on terms,

Assignee of equity of redemption

(e) *Lomas v Bvd*, 1 Vern 182

(f) *Ante*, p 164

(g) *Wynne v Styau*, 2 Ph 306, *Waugh v Land*, 6 Coop 130, *Wicks v Scrivens*, 1 J & H 215, *Pearce v Morris*, L R 5 Ch A 227

(h) *Cholmondeley v. Clinton*, 2 J & W

134 See *Palk v Clinton*, 12 Ves 48, 49

(i) *Hall v Heward*, 32 Ch D 430, C A

(k) *Kinnaird v Trollope*, 39 Ch D. 686

(l) *Anon*, 3 Atk 314

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namely, that on taking the account he should be allowed to surcharge and falsify only, and that the interest on the mortgage should be calculated at 5 per cent. But the assignee of the mortgagor *pendente lite*, after action for redemption brought by the mortgagor, is bound by a decree for foreclosure in his absence (*m*); and after foreclosure and decree, must pay the costs of revivor (*n*). If the assignee purchase the equity of redemption without communicating with the mortgagee, whose mortgage turns out to have been executed by the fraud of the mortgagor, the assignee will be cast (*o*).

Contractor
for purchase

A contractor for the purchase of the equity of redemption is not entitled to redeem until he has accepted the title so as to be in a position to call for a conveyance (*p*).

Voluntary
conveyance

Although a voluntary conveyance be, under 27 Eliz c 4, fraudulent and void against a mortgagee, who is, *pro tanto*, a purchaser, nevertheless the party claiming under the deed is entitled to redeem (*q*), and *a fortiori* he is now so entitled.

Tenant

It has been said that a tenant may redeem or procure one to redeem for him (*r*). So, it has been held that a tenant for years in occupation under an agreement for a lease made prior to 1882 by a mortgagor, without the consent of his mortgagee, was entitled to redeem, the mortgagee having refused to adopt the agreement (*s*).

Pursue
mortgagees

Subsequent mortgagees may redeem (*t*); but they must make the mortgagor or his heir party to the action (*u*); and if the first incumbrancer be not in possession, they must pay him all the arrears of interest (*x*). If the first mortgagee does not appear at the hearing, the subsequent mortgagee will be allowed to make the decree absolute against him (*y*).

First
mortgagee
refusing pay-
ment.

But a first mortgagee ought, without a judicial proceeding, to accept payment from a second mortgagee, although he has not the concurrence of the mortgagor; and the refusal of the first mortgagee to do so, on tender after notice, debarred him of his

(*m*) *Wood v Surri*, 19 Beav 551
(*n*) *James v Harding*, 24 L J Ch

749

(*o*) *Vorley v Cooke*, 1 Giff 230

(*p*) *Tasker v Small*, 3 My & Cr 69, *Pearce v Morris*, L R 5 Ch A 227, 231 See also *Tarn v Turner*, 39 Ch D 456, 465, C A

(*q*) *Rand v Cartwright*, 1 Ch Ca 59, *Howard v Harris*, 1 Vern 193, *Barthrop v West*, 2 Rep in Ch 62.

(*r*) *Keech v Hall*, 1 Doug 21

(*s*) *Tarn v Turner*, 39 Ch D 456, C A

(*t*) *Fell v Brown*, 2 Bro C C 276 See 4 & 5 Will III c 16

(*u*) *Farmer v Curtis*, 2 Sim 466

(*x*) *Aston v Aston*, 1 Ves Sen 264, 268

(*y*) *Cottingham v Lord Shrewsbury*, 5 Sim 395

right to the costs of the foreclosure suit, though he might, perhaps, in strictness have objected to assign the debt (z). CHAP XXXVIII

The trustee of a bankrupt may redeem (a); but neither an insolvent (b) nor a bankrupt, though uncertificated, can do so (c). Trustee of bankrupt

Sect 70 of 6 Geo. IV c. 16, and sect. 149 of 12 & 13 Vict. c. 106, which enabled the assignees of a bankrupt to revest the legal estate by tender or payment before the day fixed, are not included in the Bankruptcy Act, 1869 (d), or in the Acts now in force.

Whether a mortgagor who had become insolvent and filed his petition under 5 & 6 Vict c 116, and had after the final order obtained a discharge from the creditors, but had failed in obtaining a reconveyance from the official assignee, could maintain a suit for redemption of the mortgage, seemed to be doubtful, if the defendant mortgagee demurred, or the official assignee resisted the jurisdiction of the Court; as no express power was given of compelling the assignee to assign a surplus, or of taking off the file or dismissing the petition, or otherwise determining the duties of such assignee (e), especially if the surplus was not clear or in danger (f); but the better opinion is, that neither an insolvent or bankrupt (g), or their creditors, can redeem (h).

It was well settled under the old law that a creditor who had obtained a judgment against his debtor might redeem a mortgage of freeholds, without taking out execution (i), by virtue of his so-called general lien on the land (k); but the rule was different as to mortgaged leaseholds, in which case execution must first have been issued (l). Since the statute 27 & 28 Vict c 112, it is only by issuing legal or equitable execution that creditors can obtain any charge or lien upon the land of their Judgment creditors

(z) *Smith v Green*, 1 Coll 555, *Pearce v. Morris*, L R 5 Ch A 230

(a) *Franchlyn v Fern*, Barn Ch R 30

(b) *Kay v Fosbrooke*, 8 Sim 28 But see *Latour v Holcombe*, 8 Sim 76 (qu)

(c) *Tarleton v Hornby*, 1 Y & O Ex 172, *Motion v Moojen*, L R 14 Eq 202

(d) *Dunn v Massey*, 6 A & E 479

(e) *Preston v Wilson*, 5 Ha 185, *Wearing v. Ellis*, 6 De G M. & G 596, *Saxton v. Davis*, 18 Ves 72

(f) *Dyson v Hornby*, 7 De G M & G 1

(g) *Roche v Battersby*, 2 H L C 408, *Re Leadbitter*, 10 Ch D 388, C A

(h) *Heath v Chadwick*, 2 Ph 649, *Davis v Snell*, 2 De G F & J 468

(i) *Sharpe v Earl of Scarborough*, 4 Ves 538, *Tunstall v Trappes*, 3 Sim 286, 300

(k) *Stonshewer v Thompson*, 2 Atk 440

(l) *Sherley v Watts*, 3 Atk 200, *Angell v Draper*, 1 Vern 399.

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debtor (*m*) It is clear that creditors who have actually issued execution are entitled to institute proceedings for redemption (*n*); so also a creditor who has taken out a sequestration (*o*); and in one case it has been held that a judgment creditor, who had filed a bill to redeem against the debtor and his mortgagees without having first obtained execution, was entitled to the ordinary redemption decree (*p*) It would thus seem that any creditor, who has entered up his judgment without issuing a writ of *elegit*, being now in a position to obtain equitable execution, is entitled himself to bring an action for redemption of the mortgaged property.

If a judgment stand between two mortgages, it was held by Lord Thurlow that the judgment creditor, in a suit to redeem the first mortgage, need not make the subsequent mortgagee a party to his action in order to postpone him (*q*). But as the second mortgagee must be interested in the account, it is somewhat difficult to understand the grounds on which his lordship arrived at this decision

Creditors in
bankruptcy,
&c.

If a trustee in bankruptcy (*r*), or a trustee of a deed of arrangement for the benefit of creditors (*s*), refuse to enforce their right of redemption, the creditors may bring their action for relief

Plaintiff in
creditor's
suit

The plaintiff in a creditor's suit may, after a decree for sale of the real estate, bring a supplementary action for redemption against the mortgagee in order to carry out the sale (*t*)

Crown, &c

The Crown, or its grantee, might have redeemed on forfeiture of the equity of redemption (*u*), and now the administrators or interim curators of the estate of the felon, under 33 & 34 Vict. c. 23, may do so (*x*).

Lord of
manor

So the lord, claiming the reversion by escheat, may redeem a mortgage term (*y*).

Surety.

A surety to a mortgage is entitled to redeem (*z*) by reason of his right to pay off the debt, and to avail himself of all the

(*m*) 27 & 28 Vict c 112, s 1
(*n*) *Champneys v Burland*, 23 L T
N S 584, 19 W R 148
(*o*) *Fawcett v Fothergill*, Dick 19
(*p*) *Beckett v Buckley*, L R 17 Eq
435 See *Hutton v. Haywood*, L R 9
Ch A 229, *Wells v Kulpin*, L R
18 Eq 298
(*q*) *Shepherd v Gwynnet*, 3 Swanst
151.

(*r*) *Franklyn v Fern*, Barn Ch R
30
(*s*) *Troughton v Binkes*, 6 Ves 573
(*t*) *Christian v Field*, 2 Ha 177
(*u*) *Att -Gen v Crofts*, 4 Bro P C
138, *Lovell's Case*, 1 Salk 85
(*x*) See ante, p 643
(*y*) *Downe v Morris*, 3 Ha 394 See
Beale v Symonds, 16 Beav 406
(*z*) *Green v. Wynn*, L R 4 Ch A
204.

remedies of the creditor (*a*); but a surety for part of a debt is not entitled to the benefit of a mortgage given by the debtor to the creditor at a different time for another part of the same debt, and, therefore, is not entitled to redeem such mortgage (*b*)

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Where a married woman mortgages her separate estate with the concurrence of her husband, the presumption is that the money was raised for his benefit, and, in the absence of rebutting evidence, the wife is regarded as a surety, with all rights incident to that relation, and will, therefore, be entitled to redeem (*c*)

Husband and wife

If the wife's leasehold be mortgaged by the husband and wife, and the husband covenants to pay the debt, and afterwards reduces the amount of the debt out of his money, and dies, leaving his wife the survivor, the wife may, it seems, redeem, on placing the husband's estate in the situation of the mortgagee to the amount of the sum paid by the husband (*d*).

If a term of years be purchased by a husband, in the joint names of the husband and wife, and the husband mortgage it, and afterwards die in the lifetime of his wife, the creditors of the husband may, it seems, redeem (*e*)

A creditor was permitted to redeem whose debt was considered to be released by operation of law, and to subsist in equity only, as in the case (*f*) of a bond given by a husband before marriage to his wife for a sum of money payable after his decease.

Wife creditor of husband

A committee of a lunatic may redeem out of the rents and profits for the benefit of the lunatic's estate (*g*); and it is said that he may do so out of the personal estate of the lunatic without the leave of the Court, if threatened with foreclosure (*h*); but in such a case the proper course is to obtain an order of the Court (*i*).

Committee of lunatic

And a guardian of an infant may apply the rents of a descended estate in discharge of the principal of the mortgage, because the mortgage is a subsisting charge on the estate (*k*).

Guardian

(*a*) See as to sureties to mortgages generally, *ante*, Ch IX, pp 78 *et seq*

(*b*) *Wade v Coope*, 2 Sum 155

(*c*) *Earl of Kannoul v Money*, 3 Swanst 202, n, *Hudson v Carmichael*, Kay, 613

(*d*) *Pitt v Pitt*, T & R 180 *Sed quare*, if the husband's representatives would not have been absolutely entitled to the equity of redemption if it had been reserved to him, the estate being a chattel real, of which he could

have absolutely disposed without his wife's concurrence *Note* — In the register book the case is entered as *Pitt v Reid*. And see *Clark v Burgh*, 2 Coll 221.

(*e*) *Watts v Thomas*, 2 P Wms 365

(*f*) *Acton v Pearce*, 2 Vern 480.

(*g*) *Exp Grimstone*, Amb 706

(*h*) *Pow Mort*, p 285, n

(*i*) See 53 Vict c 5, s 117 (1)

(*k*) *Palmer v. Danby*, Prec. Ch 137

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Heir

An equity of redemption will, in its descent, devolve in like manner as the legal estate, that is, to the common law, or customary heir, according to the circumstances of the case; to such heir the right of redemption of course belongs; and upon an action by an heir-at-law to redeem, a *prima facie* title is sufficient (*l*) So, also, if the land be gavelkind or borough-English, the heir special will be entitled to redeem (*m*).

Dowress and
tenant by
curtesy

A dowress (*n*) may redeem. So, also, may a tenant by curtesy (*o*).

Devisee

The *heres factus*, or devisee of the equity of redemption, is entitled to redeem, and he need not make the heir-at-law of the mortgagor a party, unless he claims to have the will established (*p*) And a devisee has a right to redeem against a purchaser from a pretended heir, with notice of the pendency of a suit to establish the will (*q*)

Personal re-
presentatives

If the subject-matter of the mortgage is leasehold or other personality, the legal personal representatives of a deceased mortgagor may redeem But if the mortgage is of realty in fee, the personal representatives cannot redeem in the absence of the heir-at-law or customary heir or devisee (*r*). Even though the mortgage is for a term created out of the inheritance, the legal personal representatives cannot redeem; so also if the equity of redemption escheats to the Crown (*s*) So, where freeholds were mortgaged for a term, and the owner of the equity of redemption, by his will, directed the mortgage to be paid off and the term to be assigned to one person, and devised the fee to another person, it was held that the right to redeem passed to the devisee of the fee (*t*).

The persons who are to avail themselves of the equity of redemption must be the same as those who, during the time fixed in the mortgage deed, could have redeemed at law, or their representatives or assigns; for otherwise equity would alter the bargain, and, therefore, where a term of years is mortgaged by an executor or administrator, the equity of redemption passes to the representative of such executor or

(*l*) *Pym v Bowerman*, 3 Swanst. 241, n, *Lloyd v West*, 1 Ph 61

(*m*) *Farwell v Lowther*, 2 Ves Sen. 300, 304

(*n*) *Palmer v Danby*, Prec Ch 137. But see *Dawson v Bank of Whitehaven*, 6 Ch D 218, C A, post

(*o*) *Jones v Meredith*, Bumb 346.

(*p*) *Saunders v Hawkins*, 8 Vin. Abr. 156, 2 Eq Ca Abr 771, *Hall*

v Dench, 1 Vern 342, *Lewis v Nangle*, 2 Ves Sen 431, *Phillips v Hale*, 1 Rep in Ch 191 See 1 Vict c 26, s 3

(*q*) *Finch v Newnham*, 2 Vern 216

(*r*) *Fray v Drew*, 11 Jur N S 130

(*s*) *Catley v Sampson*, 33 Beav 551

(*t*) *Amhurst v Lutton*, 5 Bro P C 254

administrator, though he be not the representative of the deceased, and does not pass to the administrator *de bonis non* of the deceased (*u*).

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Legatees whose legacies are charged on the mortgaged land may apparently redeem (*x*); but it seems that they can only sue through their trustee or executor unless he refuses to do so (*y*). Legatees

Where property subject to a mortgage is settled to uses, the tenant for life is entitled to redeem, and to have the legal estate conveyed to himself, but must hold the equity of redemption subject to the limitations of the settlement (*z*). So, also, an equitable tenant for life may redeem (*a*). Tenant for life

The mortgagee of tenant for life may redeem a mortgage in fee; but if the tenant for life die before decree, his mortgagee will have to pay costs, and his action will be dismissed (*b*). Mortgagee of life estate

A tenant in tail (*c*), or other remainderman or reversioner (*d*), may redeem. But a remainderman cannot, during the continuance of a particular estate, redeem a mortgage of the fee where the mortgagee of the fee is also mortgagee of the particular estate, except by consent of the mortgagee (*e*). Remainderman

A jointress may redeem (*f*).

Jointress

ii.—Limitation of Equity of Redemption to new Uses.—A very important class of cases is next to be considered, viz., those in which the question has been, whether it is intended by the parties making the mortgage that the equity of redemption shall be limited in a manner different from the uses subsisting in the estate prior to the mortgage, or shall result to the same uses.

As a general rule, it may be laid down that where the equity of redemption is limited to persons other than the owners, the right is nevertheless in the owners (*g*); but the mere frame of the deed may so clearly show an intention to act upon the limitation of the equity of redemption that the Court would be bound to give effect to it (*h*); but a clear intention must be

General presumption against change of ownership

(*u*) *Butler v Bernard*, Freem Ch 139, *Skeffington v Whitehurst*, 9 Cl & F 219. And see *Greenwood v Rothwell*, 7 Beav 279.

(*x*) *Batchelor v Middleton*, 6 Hare, 75, 78.

(*y*) See *Troughton v Binks*, 6 Ves 573.

(*z*) *Lewis v Nangle*, Amb. 150, 1 Cox, 240, *Earl of Kinnoul v Money*, 3 Swanst 202, n., at p 219, n., *Wicks v Servens*, 1 J & H 215, *Pearce v Morris*, 1 L R 5 Ch A 227.

(*a*) *Haymer v Haymer*, 2 Vent 343.

(*b*) *Riley v. Croydon*, 2 Dr & S 293.

(*c*) *Playford v Playford*, 4 Ha 546.

(*d*) *Aynsley v Reed*, Dick 249.

(*e*) *Ravald v Russell*, Yo 9, 21, *Prout v Cock*, (1896) 2 Ch 808.

(*f*) *Howard v Harris*, 2 Ch Ca.

147, *Smithett v Hesheth*, 44 Ch D 161.

(*g*) *Hyphm v Wilson*, 3 De G & S 738.

(*h*) Sug H L 174. See *Rowell v Whalley*, 1 Rep in Ch 116,

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shown to change the ownership of the property (i) for purposes other than those of the particular mortgage (l).

It is not necessary that the mortgage deed itself should contain an express declaration or recital of such intention (l); but where no such declaration or recital appears, the presumption is that the mortgage is for the mere purpose of raising money, and consequently against any alteration of the previous rights. The presumption, however, may be rebutted if the ~~special~~ special circumstances of the case afford sufficient evidence of intention.

"In cases thus depending on intention there cannot, of course, be any general rule. Each case must depend upon its own particular circumstances. The authorities seem to me to furnish us with no further guide than that the charge upon the estate, being, of course, in cases of this nature, the immediate motive of the deed, the Court will not impute the further intention to change the limitations, unless that further intention appears by recital or other special circumstances, and that the mere fact of the reservation of the equity of redemption deviating in a slight or partial degree from the original limitations of the estate, does not of itself furnish sufficient ground for imputing the further intention to change the limitations, but is rather to be ascribed to inaccuracy or mistake" (n).

Express limitation of different uses

In *Innes v Jackson* (o), there was a distinct and subsequent clause declaring the uses, and a doubt has been expressed whether the intention to change the equitable title to the estate would ever be inferred from the mere language of the proviso for redemption (without aid from other parts of the instrument) in whatever terms it were framed (p). At all events, in cases depending merely upon the reservation of the equity of redemption, variations which can reasonably be referred to mistake or inaccuracy are not to be regarded, but if the variations be such that they cannot from their nature be referred to mistake or inaccuracy, they must, it is submitted, have their effect (q).

(i) *Lord Hastings v Astley*, 30 Beav 260.

(k) *Barnett v Wilson*, 2 Y & C C C 407, *Eddleston v Collins*, 3 De G M & G 1, *Parker v Hills*, 7 Jur N S 833, H L, reversing 4 De G & J 362.

(l) *Innes v Jackson*, 16 Ves 367. See *Eddleston v Collins*, 3 De G M & G 1, at p 15.

(m) *Heather v. O'Neil*, 2 De G. & J.

399, and cases there cited.

(n) *Per Turner, L J*, in *Heather v O'Neil*, *sup*, at p. 414.

(o) 16 Ves 356, commented on in *Martin v Mitchell*, 2 J & W 423, 424, and reversed, 1 Bl 136. See *Rouel v Walley*, 1 Rep in Ch 116.

(p) 2 Dav Conv, 4th ed vol 11 pt 2, pp 41, 42.

(q) *Heather v O'Neil*, 2 De G. & J. 399, 416.

Where several mortgages were made in which the limitations of the equity of redemption varied, it was held that no intention to re-settle was shown (*r*); but the Vice-Chancellor's decision, which was reversed, may be deemed more in accordance with other authorities (*s*)

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Several mortgages with different limitations

Where the instructions for the mortgage were to re-settle the estate upon the same uses, no effect was given to an alteration (*t*)

Variation contrary to instructions

There is a distinction also between a mere mortgage and a conveyance to trustees on trusts expressly declared, in which latter case effect will be given to the altered ownership (*u*).

If a mortgage be made under a power of appointment, whether in fee or for years, it is a revocation of the subsisting uses *pro tanto* (*x*), and therefore whether the form of the proviso for redemption be that on payment of the mortgage money the appointment shall be void, or that the estate shall be reconveyed to the old uses, or shall be conveyed to the use of the mortgagor, his heirs and assigns, the equity of redemption will in all respects, in the absence of evidence of contrary intention, correspond with the title prior to the mortgage (*y*).

Mortgage under power

The case of *Anson v Lee* (*z*) seems opposed to this rule, but has been questioned by Sir E Sugden (*a*)

The result is, that unless there be on the face of the instrument, or from a comparison of the wording of different instruments of mortgage, an indication of an ulterior intention inconsistent with a future exercise of the power (*b*), in the case of the execution of a special power by way of mortgage, the right of redemption will remain in the persons entitled to the estate in default of appointment (*c*). If a mortgage is made by the exercise of a general power of appointment, the equity of redemption is apparently in the appointor (*d*)

(*r*) *Whitbread v Smith*, 3 De G M & G 727

(*s*) *Barnett v Wilson*, 2 Y & C C C 407, *Atkinson v Smith*, 3 De G & J 186, *Farw Pow* 139, *Sug Pow*, 8th ed p 274, *Fish Mtg*, 4th ed p 704

(*t*) *Meadows v. Meadows*, 16 Beav 404

(*u*) *Fitzgerald v Fauconberg*, Fitz 207, followed in *Heather v O'Neil*, 2 De G & J 399

(*x*) *Thorne v Thorne*, 1 Vern 141

See *Perkins v Walker*, 1 Vern 97. And see *Farwell on Powers*

(*y*) See *Innes v Jackson*, 16 Ves 367, *Pow Mtg*, p. 346, *Patch on Mtg*, p 176, *Hyphkin v Wilson*, 3 De G & S 738 See *Fitzgerald v Fauconberg*, *sup*

(*z*) 4 Sim 364

(*a*) *Sug Pow*, 8th ed p 275

(*b*) *Fitzgerald v Fauconberg*, Fitz 207, *Barnett v Wilson*, 2 Y & C C C 407, but *quere* this case

(*c*) *Innes v Jackson*, 16 Ves 356

(*d*) *Re Van Hagan*, 16 Ch D. 30

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Where a mortgagor, having a power to appoint by will, appointed to the mortgagee by will and covenanted not to revoke the will, the mortgage did not prevent revocation, but the mortgagor was left open to an action for damages (*e*) although he had become bankrupt, as the contingent liability under the covenant was incapable of proof under the bankruptcy and not released by it (*f*).

Where real estate was settled upon trust for a married woman for life, and subject thereto upon trust "for such person or persons, not being her present husband or any friend or relative of his, and for such estate or estates," as she should by deed or will appoint, with trusts over in default of appointment, and the tenant for life mortgaged the property in fee by a deed containing no recitals, but reserving the right of reconveyance to her and her heirs or assigns, or as she or they should direct, and she afterwards made a will containing a general devise to her sister and her children, it was held that, in the absence of any indication of intention to the contrary by the deed itself or the circumstances of the case, it must be presumed that there had been merely an inaccuracy or mistake in the way in which the equity of redemption had been reserved, and that the real intention was not to confer upon the mortgagor an absolute estate in fee simple, but that the equity of redemption should follow the original limitations in her favour, including her power of appointment, which it was further held was not exercised by the general devise contained in her will (*g*).

Inconsistency between proviso for redemption and trust of surplus sale moneys

By a marriage settlement land of the husband was conveyed to such uses as the husband and wife should jointly appoint, with remainders over in default of appointment. The husband and wife mortgaged the property in exercise of their power, and by the mortgage deed the reservation of the equity of redemption was to the old uses, and the trusts of the surplus sale moneys were for the husband, his heirs, executors, and administrators; it was held that the latter trust prevailed (*h*). A resulting trust is to be applied in these cases only where it appears that the taker is not intended to take beneficially (*i*).

Mortgages by husband and wife.

These questions have generally arisen in mortgages by husband and wife; and the principle of equity in such cases is,

(*e*) *Shep Touchet* by Preston, 401, Sug Pow, 8th ed p. 214, *Robinson v Ommaney*, 23 Ch D 285, C A

(*f*) *Robinson v Ommaney*, *sup*

(*g*) *Re Byron's Settlement*, *Williams v Mitchell*, (1891) 3 Ch 474

(*h*) *Jones v Davies*, 8 Ch D 205

(*i*) *Ibid*, at p 216

that if money be borrowed by the husband and wife upon the security of the wife's estate, although the equity of redemption is by the mortgage deed reserved to the husband and his heirs, or to the husband and wife and their heirs, yet there shall be a resulting trust for the benefit of the wife and her heirs (*k*), and that the wife or her heir shall redeem, and not the heir of her husband (*l*) The same principle applies if the wife concur in a mortgage of her jointure lands (*m*), in which case the general rule is, that her concurrence to let in the mortgage shall not prejudice her rights, although the equity of redemption be limited to the husband and his heirs, but she shall, on his death, be admitted to redeem

On the same principle, where an owner in fee died intestate, leaving a widow entitled to dower, who concurred with the heir-at-law for the purpose of releasing her dower in a mortgage to a building society, which provided that, on payment off of the mortgage, a statutory receipt should be indorsed on the deed to the intent that the property comprised therein be revested in the person or persons for the time being interested in the equity of redemption, it was held that the release was made only for the purposes of the security, and was at an end when the reconveyance took place so as to restore her right to dower (*n*) The decision must have been different if the mortgage had been made by a husband married before the Dower Act (*o*), with the concurrence of his wife, to release her dower, as in that case he would have died entitled only to an equitable estate out of which there could then be no dower (*p*)

The general principle to be applied in deciding whether it be the estate of the wife, or the estate of the husband (if the wife join in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure out of the estate, and there is a mere reservation in the proviso for redemption, which would carry the estate from the person who was owner at the time of executing the mortgage; or where the words admit of any ambiguity), is, that there is a resulting trust for the

(*k*) And see *Pitt v Pitt*, T & R 180, *ante*, p 697, note (*d*), a case of the wife's leasehold mortgaged by husband

(*l*) See *Huntington v Huntington*, 2 Vern 437, *Corbett v Barker*, 1 Anst. 138, 3 Anst 755, *Ruscombe v. Hare*, 6 Dow, 1

(*m*) *Cotton v Cotton*, 2 Rep in Ch 72; *Brend v Brend*, 1 Vern 213, *Southcoat v Manory*, Cro Eliz 744.

(*n*) *Meek v Chamberlaine*, 8 Q. B. D

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(*o*) 3 & 4 Will IV c 105

(*p*) *Dawson v Bank of Whitehaven*, 6 Ch D 218, C A

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benefit of the wife, or for the benefit of the husband, as the case may be (*q*); but it is not necessary, in order to bar the wife, that there should be sufficient evidence in the recitals to inform her of the alteration in the limitations (*r*)

The old uses were held to be altered where the mortgage was made by a husband under a general power, and there was superadded a trust for sale and an express trust for himself in fee (*s*)

And so where a modification of the equity of redemption was made in order to enable the wife to deal with it without a fine (*t*)

Where a wife joined in a mortgage and released a rent-charge to which she was entitled, her equity of redemption was not barred because there was no express contract to bar it (*u*) The same result followed where the wife was ignorant of the effect of the proviso and had no intention to bar her rights (*x*)

Similarly, where money of a married woman was lent on mortgage, and by the mortgage deed the mortgage money was made payable to the husband and wife or the survivor, on proof that the wife did not consent and was not represented by a separate solicitor the deed was rectified (*y*).

Effect where
equity of
redemption is
made subject
to power.

In one case (*z*), in which the estate of the wife was conveyed by way of mortgage in fee, and the equity of redemption was limited to such uses as the husband and wife should jointly appoint, and in default of such joint appointment, then as the wife should by will appoint, and in default of any such appointment, to the wife in fee, the Master of the Rolls doubted if there was any alteration of the wife's estate, but this opinion is justly questioned by Sir E. Sugden (*a*)

In a later case, where husband and wife demised the wife's lands, and covenanted to levy a fine, to confirm the mortgage term, and subject thereto to enure to the use of the husband in fee, and for no other purpose whatever, it was held that the wife's right of redemption was barred (*b*).

(*q*) See *Jackson v Innes*, 1 Bl 126

(*r*) *Innes v Jackson*, 16 Ves 356

(*s*) *Heather v O'Neil*, 2 De G & J 399

(*t*) *Atkinson v Smith*, 3 De G & J 186, hardly reconcilable with *Whitbread v Smith*, 3 De G M & G 727 See Sug Pow, 8th ed p 285, Farw Pow, p 139

(*u*) *Re Betton's Trust Estates*, L R 12 Eq 553

(*x*) *Stansfield v Hallam*, 5 Jur N S 1334, 29 L J Ch 173

(*y*) *Knight v Knight*, 11 Jur N S 617

(*z*) *Martin v Mitchell*, 2 J & W 423

(*a*) 1 Sug Pow, 8th ed p 311

(*b*) *Reeve v Hicks*, 2 S & St 403.

The above rule applies equally to a mortgage of the wife's chattels real, unless a contrary intention appear from the deed (c), though slighter evidence would appear to be sufficient in this case (d).

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Chattels real

The case of *Ruscombe v Hare* (e), in the House of Lords, shows strongly the force of the rule. In that case the estate devolved on the wife already charged with the mortgage, and the husband paid a considerable sum in keeping down the interest; he and his wife afterwards joined in deeds of conveyance and fine to the mortgagee, reserving the equity of redemption to the husband in fee; after his death, the heir of the wife obtained a decree for redemption against his heir, and against the representatives of a purchaser of part of the estate from him.

The following conclusions may be drawn —

General result
of the cases

1. Where the mortgage is for the mere purpose of raising money, the presumption is against any alteration in the previous rights

2 A different reservation of the equity of redemption is not enough to rebut the presumption.

3. A recital is not necessary, but is very advisable.

4 A subsequent clause declaring new uses will suffice, especially where the mortgage is of a term and the new uses are declared of the fee.

5. There must be sufficient evidence of intention to alter the previous rights, which will depend upon the circumstances of each case.

6 It will require stronger evidence to alter the rights of a wife

7 The alteration will be effectual if there is an object ulterior to the purposes of a mortgage.

8 The above principles apply to an appointment by way of security.

The effect on the old uses of a disposition by a tenant in tail by way of mortgage or for any other limited purpose, is regulated by statute (f), the effect of which is that a disposition for a limited purpose, if it create only an estate *pour autre vie*, or a term of years absolute or determinable, or a charge without any estate to secure it, is only a bar of the entail *pro tanto*, although

Bar of estate
tail

(c) *Clark v Burgh*, 2 Coll 221,
Pygot v Pygot, L R 4 Eq 549
(d) *Watts v Thomas*, 2 P Wms

(e) 2 Bl N S 122 And see *Wood*
v. Wood, 7 Beav 183
(f) 3 & 4 Will IV c 74, s 2

CHAP XXXVIII an intention is expressed or implied that it should operate as a total bar, to give effect to such an intention, the deed must contain a further valid disposition to the extent intended; whilst, on the other hand, a disposition creating an actual estate greater than an estate *pour autre vie* will operate as a total bar of the estate tail to the extent of the estate created, although it be only as a security, and the deed declare that it is intended to be a bar *pro tanto* merely. To give effect to that intention on the estate tail must be re-limited subject to the interest created. In either case the further limitations may be created by the same deed; for, although the statute denies effect to a mere intention, whether implied or expressed, yet it does not of course prohibit the express limitation of the old or any other uses which the tenant in tail may choose to introduce. The clause is skilfully yet singularly framed; but it expressly denies, in the general case provided for, effect to an express declaration confining the operation of the deed to the incumbrance created, whilst it equally denies, in the excepted cases, effect to an express declaration extending the operation of the charge beyond its immediate purpose; the object was to put an end to such questions as arose in *Jackson v. Innes* (g).

In a case arising in New South Wales, to which colony the Fines and Recoveries Act does not extend, where a mortgage recited that the mortgagor was entitled under his father's will to a life estate, with remainder to his children as tenants in tail, with cross remainders between them, and that for the purpose of increasing the mortgagee's security, a daughter and her husband had agreed to join for the purpose of barring the entail; and the deed provided that if the money should be paid, the mortgagee should reconvey the hereditaments to the mortgagors according to their respective estates and interests therein, it was held that the hereditaments must be reconveyed to the uses limited by the will, and not as altered for the purposes of the mortgage (h).

Mortgage not
redeemable
before day of
payment.

iii.—When the Right of Redemption first arises —A mortgage is not redeemable before the day thereby fixed for the payment of the mortgage moneys, though the full amount of principal

(g) 1 Bl. 123, Sugd H. L. 174.
See Sugd. R. F. Stat. 2nd ed. p. 200.

(h) *Plomley v. Felton*, 14 App. Cas. 61, P. C. See *Re Byron's Settlement*, *Williams v. Mitchell*, (1891) 3 Ch. 474.

and interest up to that day be offered to the mortgagee (i) This period is usually six months from the date of the deed But the period may be shorter or longer, provided its duration is fixed and not unreasonable (k) The period must be ascertainable by reference either to a fixed day, or to the happening of a certain event, if the period be uncertain, or of unreasonable duration, equity may grant relief by decreeing redemption before the determination of the period (l)

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The proviso for redemption is not merely a restriction on the mortgagee's right, but is a substantive agreement between the parties as to the time of payment (m)

Redemption was allowed before the day of payment under a peculiar form of proviso enabling the mortgagor to redeem on a day named, or on payment before or after it (n)

The Lands Clauses Act (o) provides for the payment off of mortgages of lands compulsorily taken before the day limited for payment, with compensation for expense of re-investment, and in certain cases, for loss arising through change of investment

Time of redemption under Lands Clauses Act

Where a mortgage deed contained mutual covenants binding the mortgagee not to call in, and the mortgagor not to pay off, the loan for five years, it was held that a subsequent mortgagee with notice of the covenants was not entitled to redeem the prior mortgage until the expiration of the stipulated period (p)

Effect of clause postponing time of payment

The right to call in the money, and the correlative right to redeem, may be postponed by agreement until after the happening of a given event, as the death of a named person (q).

Where the loan is made repayable at the end of six or nine months, the borrower may at his option pay off the debt at the end of either period (r)

Alternative periods

In a Welsh mortgage, the mortgagor may redeem at any time (s).

Welsh mortgage

If the mortgage is made redeemable on payment "or demand," or if no time is fixed for redemption, as in the case of a mortgage

Effect where no day is fixed for payment

(i) *Brown v Cole*, 14 Sim 427
See *Burrowes v Molloy*, 2 J & L 521, *Burrough v Cranston*, 2 Ir Eq R 203

(k) See *ante*, p 136

(l) See *Newcomb v Bonham*, 1 Vern 8, *Talbot v Bradyl*, 2 Vern 183, *Cowdry v Day*, 1 Griff 316

(m) *Day v Day*, 31 Beav 270

(n) *Harding v Tungey*, 10 Jur N S 872

(o) 8 Vict c 18, s 114

(p) *Lawless v Mansfield*, 1 Dr & War 557

(q) *Ante*, pp 135, 136

(r) *Reed v Kribun Co-operative Soc*, L R 10 Q B 264

(s) See *ante*, p 27

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by simple deposit of deeds, then, inasmuch as the mortgagee is in a position without formal demand to call in and sue for the debt, the mortgagor has a correlative right to relieve himself from his liability by redeeming at any time (*t*)

Mortgagee in possession

If a mortgagee enters into possession before the day fixed for payment the mortgagor may redeem at once (*u*)

Mortgagee entitled to six months' notice

iv.—Notice to redeem — After default, the mortgagee is generally entitled to notice before he can be compelled to accept payment, in order that he may have a reasonable opportunity to find a new security for his money (*x*)

It has become a settled rule that in the case of a regular mortgage deed, with a proviso for redemption, a mortgagor must, after default made by him in payment of the money according to the proviso, give the mortgagee six calendar months' notice of his intention to pay off the mortgage, or six months' interest in lieu of notice (*y*)

Interest in lieu of notice

If the mortgagor be willing to pay six months' interest in advance (*z*), notice will be unnecessary (*a*), and whether regarded as interest or as a consideration for the relinquishment by the mortgagee of his right to notice, since the repeal of the usury laws, no danger will be incurred by the transaction

Meaning of "month"

In mortgage transactions, the expression month always means calendar month (*b*).

When a new notice is required.

Where notice is given by the mortgagor to pay off, and the money is not paid on the day, the general rule is that a further six months' interest is payable if the mortgagee demand it (*c*), or unless acquiescence in the delay is to be implied from his conduct (*c*)

Trustee for sale.

Where a conveyance on trust for sale, but without any proviso for redemption, was held to be a mortgage, the usual six months' notice was directed (*d*)

Depositee of deeds not entitled to notice

But in a recent case it has been held that an equitable mortgagee, by deposit of title deeds of land, is not entitled to six

(*t*) See *infra*

(*u*) *Bovill v Endle*, (1896) 1 Ch 648, stated *inf* p 710

(*x*) See *Browne v Lockhart*, 10 Sim 420, 424

(*y*) 2 Ca and Op p 51, tit Mitge Burton, *Shaynell v Blake*, 2 Eq Ca Abr 603, pl 34, *Smith v Smith*, (1891) 3 Ch 550

(*z*) *Johnson v Evans* (No 2), W N (1889) 95, C A

(*a*) *Anon*, Barn Ch R 324, *Hutton v Brown*, W N (1881) 116

(*b*) *Bailett v Franklin*, 15 W R 1077

(*c*) *Re Moss, Levy v Sewill*, 31 Ch D 90

(*d*) *Bell v Carter*, 17 Beav. 11

months' notice before he is bound to accept a tender of the amount due, nor to six months' interest in lieu of notice (e) CHAP XXXVIII

It will be observed that in *Bell v. Carter*, although there was no proviso for redemption, the legal estate passed for the purpose of the security, and, therefore, it might be reasonably inferred in that case that the loan was intended to be of a permanent character so as to entitle the mortgagee to six months' notice. But in *Fitzgerald's Trustee v. Mellersh*, the mortgage being by deposit merely, the just inference from the transaction was that the loan was intended to be temporary so as to render it unreasonable to infer that the parties intended that a six months' notice should be given. In that case the deposit of title deeds was accompanied by a memorandum containing an undertaking by the mortgagor to execute a legal mortgage on request, but no request had been made, and the undertaking had been rendered impossible of performance by a sale of the mortgaged property with the mortgagee's concurrence, and was accordingly disregarded. No doubt, a memorandum accompanying a deposit of title deeds might be so worded as to sufficiently indicate an intention that the loan should be permanent, so as to entitle the mortgagee to six months' notice or interest in lieu thereof. Of course, a mortgagee would be so entitled under a legal mortgage actually made pursuant to such an undertaking.

If an application is made on behalf of the Crown for sale under an extent (f) of an estate belonging to a Crown debtor, which is subject to a mortgage, notice of the application must be given to the mortgagee, and if the estate be sold absolutely under the extent and the money be paid into Court, the Crown will not be allowed upon motion to pay off the mortgagee at once without his consent; but a reference will be ordered to ascertain what is due on the mortgage (g) Extent by Crown

It is well settled that if a mortgagee demands payment, or takes any proceedings to compel payment, or to enforce his security, the mortgagor is entitled to pay him off at once, without six months' notice, or interest in lieu of notice. Bar of right to notice or interest by taking proceedings

So a mortgagee who, after the death of the mortgagor, filed a bill for the administration of his estate, was held not to be entitled to six months' notice, or interest in lieu thereof (h). Administration action.

(e) *Fitzgerald's Trustee v. Mellersh*,
(1892) 1 Ch. 385

(g) *R v. Coombes*, 1 Pri. 207.

(f) See 25 Geo. III. c. 35, s. 1

(h) *Letts v. Hutchins*, L. R., 13 Eq. 176.

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And where a mortgagee joined with the residuary legatee under the mortgagor's will in an administration action, and, subsequently to the commencement of the proceedings, the executor gave to the mortgagee six months' notice to redeem, it was held that the latter was bound to accept, in satisfaction of his claims, his principal with interest up to the time of payment, and costs, though such payment was made before the expiration of the notice (i).

Consent to
sale

Consent to a sale in an administration suit is equivalent to six months' notice (k).

Proof of debt
in action

A mortgagee who comes in and proves his debt in a cause is bound to take his money without notice, and to join in the conveyance (l).

Entry into
possession

In a recent case, a mortgagor absconded before the time fixed by the mortgage deed for payment, and the mortgagee thereupon entered into possession of the premises; it was argued on behalf of the mortgagee that the entry was not the case of taking steps to enforce the security, but merely for the protection of the property; but it was held that such entry was a taking proceedings to enforce the security, so as to deprive the mortgagee of his right to six months' interest in lieu of notice (m).

Whether
mortgagee
enforcing
security is
entitled to
interest pay-
able in ad-
vance

Where, on a mortgage of a ship, it was stipulated that the interest should be payable half-yearly in advance, and the mortgagee sold the ship before one of the days upon which the interest became payable, but the purchase was completed two days after that day, it was held that the mortgagee was not entitled to the next half-year's interest, but only to interest up to the day of completion and actual payment (n).

Mortgagor
must tender
amount due

v.—Tender of Mortgage Moneys.—A mortgagor who has given notice of his intention to pay off the mortgage on a certain day, must, in order to exclude the right of the mortgagee to a further notice, or interest in lieu thereof, make on the appointed day a strict tender of the moneys due, or the Court cannot stop the interest from running, though the circumstances of the case

(i) *Re Alcock, Prescott v Phypps*, 23 Ch D 372, C. A.

(k) *Day v Day*, 31 Beav 270

(l) *Matson v Swift*, 5 Jur 645.

(m) *Bovill v Endle*, (1896) 1 Ch. 648

(n) *Banner v Berridge*, 18 Ch. D. 254, 278.

may be such that the Court might wish to do so (o) On a proper tender being made, interest stops (p), and also all subsequent costs (q). CHAP XXXVIII

To constitute a good tender, it must be made by the proper person, to the proper person, at a proper time and place, in proper currency, and in a proper manner Requisites of tender

A valid tender may be made by any person entitled to redeem, but not by a stranger, for as against him the mortgagee's estate is absolute (r). It has been seen that guardians and committees under the sanction of the Court may redeem (s), and accordingly they may make a good tender of mortgage moneys on behalf of infants and lunatics, and it has been said by Lord Coke, that if the heir be an idiot, of what age soever, any man may make the tender for him in respect of his absolute disability, and the law in this case is grounded on charity (t). By whom a tender may be made

A solicitor or other agent may make a good tender on behalf of his client or principal (u) Tender by solicitor or agent.

A tender by the agent of a debtor of the whole sum demanded by the creditor is good, although the agent is only authorized by the debtor to tender a smaller sum, and offers the rest at his own risk (x).

If the condition was for payment by the mortgagor and another person (y), payment by that person alone, after the death of the mortgagor, was good; but not during his life Joint tender

At law the tender must formerly have been made only to the persons named in the condition (z) To whom tender must be made

In equity the tender may be made to the persons entitled to receive the money and reconvey the estate, and, if the legal and partial beneficial interest is united in one of such persons, he cannot demand payment to himself on his separate receipt (a).

Tender may be made to the executors of a deceased mortgagee, who may give a valid receipt for the money before probate (b). Tender to executors

(o) *Sentance v Porter*, 7 Ha 426
See *Williams v Sorrell*, 4 Ves 389

(p) *Bishop v Church*, 2 Ves Sen 370, 372 See *Ganforth v Bradley*, 2 Ves Sen 675, 678

(q) *Lord Malletton v Eliot*, 15 Sim 581, *Woodman v Higgins*, 14 Jur 846

(r) Lit. s 334, *Watkins v Ashwocke*, Cro Eliz 132 See *Lomax v Bird*, 1 Vern 182, *James v Brou*, 3 Swanst 234.

(s) *Ante*, p 697

(t) Co Lit 206 b

(u) See *Ward v Cartter*, L R 1 Eq 29

(x) *Read v Goldring*, 2 M & S 86

(y) *Shep Touchst* by Preston, 141

(z) Co Lit 210

(a) *Cliff v Wadsworth*, 2 Y & C C C 598

(b) *Austen v Dodwell's Executors*, 1 Eq Ca Abr tit Executors (A. b), pl 31

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Tender to
trustees

Notwithstanding the statutory powers of giving receipts (*c*), the receipt of trustees will not discharge the mortgaged estate, where the security is for a re-transfer of stock, and only cash is paid, until the trustees have invested it in an authorized investment (*d*).

Payment must be made to all the trustees, or to their joint account in a bank, notwithstanding sect 56 of the Conveyancing Act, 1881 (*e*)

Tender to one
of several
joint credi-
tors

A valid tender at law might be made to one of several joint creditors (*f*), but in equity the receipt of the creditor would not discharge the debtor from claims by the other creditors (*g*) So, where a mortgage is made to several persons jointly, they are in equity tenants in common of the mortgage money, and, accordingly, the receipt of the representatives of such of them as may be dead is necessary to discharge the debtor (*h*) It was therefore formerly usual to insert in mortgages to trustees, and in other cases where the benefit of the mortgage debt and of the security was intended to survive, a joint account clause providing that the receipt of the survivor should be a good discharge for the debt, but the insertion of such a clause is now rendered generally unnecessary by statute (*i*).

Tender to
solicitors, &c.

Independently of statutory enactment, a good tender cannot generally be made to the solicitor or other agent of the creditor (*k*).

A solicitor may, however, have an express authority to receive the mortgage moneys. So, where a mortgagee's action was compromised on the terms that the amount agreed upon should be paid out of Court to the plaintiff's solicitor, it was held that the solicitor's receipt discharged the mortgagor and his estate from the debt (*l*) So, also, such authority may be inferred from the circumstances of the case as tending to show that the mortgagee treated his solicitor as agent to receive the mortgage moneys (*m*).

Statutory
provision as

A mortgagor may now make good tender and payment to

(*c*) 22 & 23 Vict c 35, s 23, 23 & 24
Vict c 145, s 23, and Conv Act, 1881,
s 36

(*d*) *Pell v De Winton*, 2 De G & J
13

(*e*) *Re Bellamy*, 24 Ch D 387, C A,
Re Flower, W N (1884) 186

(*f*) *Husband v Davis*, 10 C B 645

(*g*) *Matson v Dennis*, 10 Jur N S
460. See *Steeles v Steeles*, 22 Q. B D,

537

(*h*) *Pickles v Cowell*, 1 Beav 529

(*i*) 44 & 45 Vict c 41, s 61, set out
ante, p 534

(*k*) *Withington v Tate*, L R 4 Ch
A 288

(*l*) *Bowton v Williams*, L R 5 Ch
A 655

(*m*) See *Kent v Thomas*, 1 H & N,
473,

the mortgagee's solicitor on production by the latter of the deed of reconveyance with a receipt in the body thereof, or indorsed, executed, and signed by the mortgagee (*n*) And trustees may now, by the Trustee Act, 1893 (*o*), appoint a solicitor to be their agent to receive such payment

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to tender to
solicitor

A tender made to an agent or servant of the creditor duly authorized to receive payment is a valid tender to the creditor himself (*p*) But as regards general agents, tender to them is, generally speaking, not sufficient, inasmuch as, in the absence of express authority, the receipt of money is not within the scope of an agent's employment (*q*) But the authority to receive payment may be inferred from the circumstances of the case (*r*)

Tender to
agent

If, however, an agent accepts tender and payment on behalf of his principal without authority, the latter may expressly ratify or by his subsequent conduct show that he has confirmed or acquiesced in the transaction, and in such case the debtor will be discharged (*s*)

Ratification
of tender to
agent

If time and place are appointed for payment of the money, tender must be made accordingly

Time and
place of
tender

A tender by the mortgagor of the money on the appointed day at any convenient time at which the money might be counted before sunset is good at law, but if both the parties meet together at any time of that day, and the mortgagor makes a tender to the mortgagee, who refuses it, the mortgagor need not make a tender again before the last instant of the day (*t*)

Tender on
appointed
day

If a particular hour be appointed, the mortgagor may attend for the purpose of making his tender at any time before the commencement of the next hour, inasmuch as an hour in law is considered to be a twenty-fourth aliquot part of the day. So, notice by a mortgagor of attendance for tender at three o'clock was held to be satisfied by his attendance at the appointed place shortly before four o'clock (*u*)

Tender at
appointed
hour

(*n*) 44 & 45 Vict c 41, s 56, set out ante, p 114

(*o*) 56 & 57 Vict c 53, s 17, subsect (1), ante, p 115

(*p*) *Goodland v Blewitt*, 1 Camp 477 See *Anon*, 1 Esp 349, *Hart v Hawthorne*, 42 L T 79

(*q*) *Burrough v Cranston*, 2 Ir Eq R 203.

(*r*) *Kirton v Branthwaite*, 1 M & W. 310 See *Finch v Boning*, 4 C. P. D. 143

(*s*) See *Duchess of Cleveland v. Dashwood's Executors*, Freem Ch 249

(*t*) *Wade's Case*, 5 Rep 114 a See 1 Selw N P, 13th ed p 187

(*u*) *Knox v Simmonds*, 4 Bro. C C. 433

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So, conversely, if an hour is fixed for payment, and the mortgagee does not appear to receive the money at the strike of the hour, the mortgagor must wait until the strike of the next hour, or there will be no sufficient attendance for tender (*x*)

When tender may be made at any time

If the mortgagee has demanded payment, or if the mortgagor is willing to pay six months' interest in lieu of notice, it seems clear that tender may be made, so as to stop further interest from running, at any time before the mortgagee has commenced his action by actually issuing his writ (*y*)

Tender at appointed place

If a particular place be appointed by the mortgage deed for the payment of the money, the mortgagee must demand payment at that place (*z*), and he is entitled to receive payment there, so that the mortgagor will not generally be at liberty by his notice to appoint a different place for making his tender (*a*). But where money was charged on land in Ireland, the place fixed for payment being in Lincoln's Inn, was, upon the whole instrument, disregarded, and the owner of the money was held not to be entitled to have it sent to England free of charges and exchange (*b*).

Tender where no place is appointed

If no place was appointed by the mortgage deed, then, unless the mortgagee makes no objection to the place appointed by the mortgagor's notice, the mortgagor must generally seek out the mortgagee and tender him the money personally, if within the realm, inasmuch as the money is a sum in gross collateral to the title, and therefore tender on the land would not be sufficient, as in the case of a rent issuing out of the land (*c*). But in such cases if attendance at the mortgagee's place of residence would entail undue hardship on the mortgagor, the appointment by the mortgagor of a different place, if within reasonable access of the mortgagee, will be good, if the mortgagee makes no objection to the place at the time of the notice.

Time and place for tender not now generally appointed by mortgage deed.

Formerly, when the proviso for redemption was in the form of a condition for defeating the mortgagee's estate, it was customary to specify in mortgage deeds the place and hour of payment of the mortgage money, so as to avoid the danger of his estate being defeated by a tender in his absence on the day

(*x*) *Anon*, 1 Coll 273 See *Bernard v Norton*, 10 L T. N S 183

(*y*) *Briggs v. Calverley*, 8 T R 629, *Kinton v. Branthwaite*, 1 M & W. 310.

(*z*) *Thorn v City Rice Mills*, 40 Ch D 357

(*a*) *Gyles v Hall*, 2 P Wms 378

(*b*) *Lansdowne v Lansdowne*, 2 Bl. 60

(*c*) Co Lat 210 b.

named, but now, having regard to the terms of the present proviso for reconveyance, and to the doctrine of equity making mortgages redeemable at any time after default, the practice has been discontinued (*d*)

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In order to constitute a valid tender, there must, as a general rule, be actual production and offer of the money (*e*). But non-production may be waived by the creditor (*f*), and actual production may be dispensed with if the creditor refuses to accept the money when the debtor offers to produce it, but before he has actually done so (*g*), but in such cases it must clearly appear that the debtor was ready to produce and pay the money at the time when he offered to do so (*h*).

Production of money due generally necessary

A letter from a debtor stating his willingness to pay the money due to the creditor, and stating that he now tenders the same, but not actually inclosing it, is not a valid tender, though the creditor treats it as such (*i*). But an actual tender by letter will be good if accepted as such by the creditor (*k*).

Tender by letter

A summons by a mortgagor, in an action by the mortgagee on the covenants in the mortgage, for stay of proceedings on payment within one month of the amount due, is not equivalent to a tender, so as to stop the interest (*l*).

Summons in mortgagee's action

The mortgagor may tender the money tied up in bags, if it is proved that they really contained the amount due, and it is at the peril of the mortgagee to miscount it (*m*).

What production is sufficient

Where a debtor offered a sum of money twisted up in bank notes, which were not shown to the creditor, stating at the time the precise sum offered, this was held to be a sufficient tender (*n*).

Where a loan is made in England of English money, the repayment must, as a general rule, be in English currency, and the debt will carry English interest, and the creditor will have a right to receive payment in England (*o*).

Currency in which tender must be made

(*d*) Dav Conv, 4th ed, vol II pt 2, p 33

(*e*) *Polglass v Oliver*, 2 Cr & J 15, *Thomas v Evans*, 10 East, 101, *Glascoot v Day*, 5 Esp 48, *Huzham v Smith*, 2 Camp 21, *Leatherdale v Sweepstone*, 3 C & P 342

(*f*) *Douglas v Patrick*, 3 T R 683

(*g*) *Han ding v Davis*, 2 C & P 77, *Black v Smith*, Peake, 88, *Jackson v. Jacob*, 3 Bing N C 869, *Norway*, 3 Moo P C N S 245, *Exp Danks*, 2 De G M & G 936. But see *Finch v.*

Brook, 1 Bing N C 253

(*h*) *Kraus v Arnold*, 7 Moo 59

(*i*) *Pouney v Blomberg*, 14 Sm 179

(*k*) *Jones v Arthur*, 8 Dowl P C 442

(*l*) *Kinnaird v Trollope*, 42 Ch D

610 See as to summons to stay proceedings in mortgagee's action, *post*, p 873

(*m*) *Wade's Case*, 5 Rep 115 But see *Suckling v Coney*, Noy, 74.

(*n*) *Alexander v Brown*, 1 C & P 288

(*o*) *Noel v Rochfort*, 4 Cl & F 158 See *Lansdowne v. Lansdowne*, 2 Bl. 60.

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Tender in
notes of Bank
of England

A doubt was formerly entertained whether a tender in Bank of England notes (if objected to by the creditor (*p*)) was such a tender as would save the condition (*q*). But now (*r*) a tender of a note of the Bank of England is, in England, a legal tender for all sums above 5*l*, on all occasions, but such notes are not a tender by the Bank of England, or any branch bank thereof. But the governor and company thereof are not to be liable or required to pay and satisfy, at any of their branch banks, notes of the company not made specially payable at such branch bank, although they are liable to pay and satisfy at the Bank of England in London all notes of the company or any branch bank.

Bank of England notes are not a legal tender in Ireland (*s*), nor in Scotland (*t*).

Tender in
notes of
private banks

The statute of Will IV applies only to Bank of England notes, and a mortgagee may still object to accept tender of his money in notes of private bankers, or bonds, bills, or other securities for money (*u*). If, however, a mortgagee accepts a tender in such a form, he will not afterwards be heard to say that the tender was not well made (*x*).

Tender in
counterfeit
coin

Even if part of the money were counterfeit coin, and the mortgagee accepted it, it has been said that this would be a good tender as such (*y*), though the mortgagee in such case might have relief by an action of deceit, or other action (*z*).

Tender in
bills.

If the money is tendered in bills which are afterwards dishonoured, the mortgagee, though he has signed a receipt for the money, will retain his lien on the estate, and will not be compelled to reconvey if he has not already done so (*a*).

Tender by
cheque

A tender by cheque is good if no objection is made to the quality but only to the amount of the tender (*b*).

A tender may, by agreement between the parties, be required to be made according to the currency of a British possession, or of a foreign state (*c*).

Tender must
be uncon-
ditional

A tender to be good must not be clogged with any con-

(*p*) *Austen v Executors of Dodwell*, 1 Eq Ca Abr 318, *Wright v Reed*, 3 T R 554. And see *Biddulph v. St John*, 2 Sch & L 534.

(*q*) *Shep Touchst by Preston*, 136

(*r*) 3 & 4 Will IV c 98, s 6

(*s*) 8 & 9 Vict c 37, s 6

(*t*) 8 & 9 Vict c 38, s 15

(*u*) *Biddulph v. St John*, 2 Sch. & L. 521.

(*x*) *Lockyer v Jones, Peake*, 180, n.,

Tiley v Courtier, 2 Cr & J 16, n., *Polyglass v Oliver*, 2 Cr & J 15.

(*y*) Bac Abr Tender, B

(*z*) *Shep Touchst by Preston*, 136, n.

(*a*) *Teed v Camruthers*, 2 Y & C C

C 31. See *Grant v Mills*, 2 Ves & B

306, *Frail v Ellis*, 16 Beav 351

(*b*) *Jones v Arthur*, 8 Dowl P C

442. See *Blumberg v Life Interests, &c Corp*, (1897) 1 Ch 171

(*c*) 33 Vict. c. 10, s 6,

dition (*d*), for a person tendering money must not make any terms, but must leave it open to the creditor accepting the money to say that more was due (*e*). CHAP XXXVIII

A mere request for a receipt does not vitiate a tender, for it is not a condition (*f*); but if the debtor demands a stamped receipt, the tender will be bad whether the debtor actually produces the money or not, for a person to whom money is due, and who refuses to deliver a stamped receipt, is liable to a penalty by statute (*g*). Where, however, a creditor refuses to accept the money tendered to him only on the ground that the amount tendered is insufficient, he cannot afterwards object to the tender on the ground that the debtor required a receipt (*h*). *A fortiori*, the tender will be bad if a debtor tenders money but will not pay, unless the creditor will give him a receipt in full of all demands (*i*), or expressing that the sum tendered is the balance due (*k*). So, if a debtor puts down a sum of money, and the creditor offers to take it in part, but the debtor will only allow him to take it as a settlement in full, there is no good tender.

Demand of
a receipt

As a general rule, the exact amount due must be tendered (*l*), a tender of part only of the amount due is inoperative (*m*). Tender must
be of full
amount

A tender of a larger sum requiring change is not good tender of a smaller sum due (*n*), unless the mortgagee objects to give change only on the ground that he disputes the amount of change to be returned (*o*). Requiring
change

The sum tendered must include the full amount due upon the mortgage for principal, interest, and costs; and the tender of a less amount is not made valid by the mortgagor having a set-off for the balance (*p*). So, if there be a mortgage from A to B No set-off
allowed

(*d*) *Jennings v Major*, 8 C & P 61

(*e*) *Strong v Harvey*, 3 Bing 304, *Evans v Judkins*, 4 Camp 156, *Chamnant v Thornton*, 2 C & P 50, *Peacock v Dickenson*, 2 C & P 50, n, *Mitchell v King*, 6 C & P 237

(*f*) *Jones v Arthur*, 8 Dowl P C 442

(*g*) *Living v Reader*, 1 C & P 257, *Ryder v Lord Townsend*, 7 D & Ry 119

(*h*) *Richardson v Jackson*, 3 M & W 298, *Cole v Blake*, Peake, 179

(*i*) *Forb v Noll*, 12 L J C P 2, *Graffith v Hodges*, 1 C & P 419, *Glascock v Day*, 5 Esp 48, *Strong v*

Harvey, 3 Bing 304

(*k*) *Higham v Baddely*, Gow, 213; *Evans v Judkins*, 4 Camp 156

(*l*) *Peacock v Dickenson*, 2 C & P 51, n, *Mitchell v King*, 6 C & P 237, *Cotwell v Finney*, L R 9 Ch A 541

(*m*) *Dickson v Clarke*, 5 C B 365

(*n*) *Robinson v Cook*, 6 Taunt 336; *Betterbee v Davis*, 3 Camp 70, *Dean v James*, 4 B & Ad 547

(*o*) *Saunders v Graham*, Gow, 111 See *Cadman v Lubbock*, 5 D & Ry 389

(*p*) *Scarles v Sadgrove*, 5 E & B. 639

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for a certain sum, and an open account between the parties, with a balance due from B to A, a tender of the mortgage money, deducting the balance due on the account, will not stop the interest, nor prevent costs being allowed to the mortgagee (g)

Tender where
amount is in
dispute

Though the tender must be unconditional, it may be of a less amount than what the mortgagee alleges to be due, the mortgagor reserving the right to dispute the amount claimed, in such a case, the question of costs will be reserved until it is ascertained whether the amount tendered was sufficient (i)

Where the amount is in dispute, the mortgagor must prove that the amount, admitted by him to be due, was actually produced and offered (s).

Where the amount of interest was disputed, but the mortgagor made no tender, he was saddled with the costs, although he succeeded on the point of interest (t)

Recovery of
over pay-
ment

If the mortgagee extort more than is due, the over-payment may be recovered by the mortgagor as money received by the mortgagee to his use (u)

Tender of
full amount
under protest

Though a conditional tender is not good, a tender under protest of the full amount claimed, reserving the right of the debtor to dispute the amount due, is a good tender if it imposes no condition on the creditor (x)

Refusal of
mortgagee to
accept tender

When the time fixed by the notice expires, the mortgagee is bound to know the amount due to him, and if that sum, or a sum calculated by the mortgagor to be the probable amount of principal, interest and costs, be tendered to him unconditionally, he is bound to accept it, and if he refuses to accept payment of such sum, he does so at his own peril. If a mortgagee refuses to accept a proper tender of the moneys due to him under his mortgage, his lien on the property will be extinguished (y), though the amount due will still be recoverable as a debt (z). And if the mortgagee refuses, when called upon, to accept the amount tendered and to execute a reconveyance of the property, he will be liable to an action to enforce the right of redemption,

(g) *Garforth v Bradley*, 2 Ves Sen. 671

(r) *Greenwood v Sutcliffe*, (1892) 1 Ch 1, C A

(s) *Dickinson v Shee*, 4 Esp 68

(t) *Hodges v. Croydon Canal Co*, 3 Beav 86

(u) *Close v Phipps*, 7 Man & Gr 586, *Fraser v. Fendlebury*, 10 W. R 104, C P.

(x) *Manning v Lunn*, 2 C & K 13, *Scott v Uxbridge and Rickmansworth Rail Co*, L R 1 C P 596, *Sweeney v Smith*, L R 7 Eq 324. See *Greenwood v Sutcliffe*, (1892) 1 Ch 1, C A.

(y) *Martindale v Smith*, 1 Q B. 389

(z) 5 Bac Abr tit. "Mortgage," D.; Co Lit 209 b

in which suit, if the tender be found to cover principal, interest and costs, the mortgagee will be fixed with the costs of the suit (*a*), but until the day fixed by the decree for redemption, the mortgagee remains invested with all the rights of a mortgagee (*b*), and he may, accordingly, after tender, get in the legal estate (*c*).

Where a mortgagor makes an unconditional tender which the mortgagee refuses to accept, and the mortgagee sells under his power, the sale will be set aside against the mortgagee, and also against a purchaser with notice, notwithstanding the proviso that a purchaser need make no inquiry (*d*)

If there are any costs due to the mortgagee, the tender must comprise them; and if the costs are in dispute, a decree will be made in such a form that, if costs are chargeable, the common mortgage account will be taken for principal, interest and costs; but if the costs are not chargeable against the mortgagor, and he has duly tendered principal and interest, the costs of the suit will fall on the mortgagee (*e*)

Dispute as to costs

A tender of a less sum than is due may be a good tender of the sum offered, if accepted as such by the creditor (*f*); but a creditor accepting a sum so tendered is not thereby precluded from proceeding for the remainder of his claim (*g*). Such a tender will not be vitiated merely by the debtor saying at the time that the amount tendered is all that he considers to be due, but if the tender implies that the creditor, by accepting the money, is required to admit that no more is due, the tender will be conditional, and therefore bad (*h*). The question whether the tender was made conditionally or not is for the jury (*i*).

Partial tender

(*a*) *Hammer v Priestly*, 16 Beav 569, *Hoshen v Sincok*, 11 Jur N S 477

(*b*) *Bank of New South Wales v O'Connor*, 14 App Cas 273, P C

(*c*) *Grurgeon v Gerard*, 4 Y & C Ex 119, 128 See Co Lat 209

(*d*) *Jenkins v Jones*, 2 Giff 99

(*e*) *Lewis v Webber*, W N (1876) 187

(*f*) *Henwood v Oliver*, 1 Q B 409, *Thorpe v Burgess*, 8 Dowl P C 603

(*g*) *Ibid*, *Sutton v Hawkins*, 8 C & P 259

(*h*) *Bowen v Owen*, 11 Q B 130, *Mansons of Hastings v Thorley*, 8 C & P 573

(*i*) *Echstein v Reynolds*, 7 A & E 80, *Marsden v Goole*, 2 C & K 133

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SECTION II.

OF THE PARTIES TO AN ACTION FOR REDEMPTION

- Who may be plaintiff Any person entitled to redeem a mortgage may institute proceedings as plaintiff to enforce his right of redemption The question who are persons entitled to redeem has already been considered (*l*)
- Who must be made defendants As a general rule, the plaintiff seeking to redeem must make all persons interested in the mortgage or in the equity of redemption, and in the proper taking of the accounts, parties to the action
- The mortgagee and his successors in title The mortgagee whose incumbrance it is sought to redeem must, of course, be made a defendant to the action; if he be dead, his executors must be made parties as defendants; but the heir of the mortgagee is not now a necessary party, though the mortgage be in fee, or of copyholds, unless, in the latter case, the mortgagee has been admitted (*l*) Where the mortgagee has made a settlement of the estate, the first owner of an estate of inheritance, and those having intermediate estates, must be brought before the Court (*m*).
- Transferees of mortgages and sub-mortgages If the original mortgagee has transferred the mortgage debt and the security, the transferee must be made a defendant And if the mortgagor be not a party to the deed of assignment of the mortgage to another party, he may make the original mortgagee a party to his action, for the purpose of making him account, though, it seems, according to the present doctrine, he is not a necessary party; and the same doctrine applies to intermediate assignees (*n*); but derivative mortgages must be made parties (*o*).
- Prior mortgagee As a general rule, a prior mortgagee is not a necessary party to a suit to redeem a subsequent mortgagee, unless the amount due to the latter cannot be ascertained in the absence of the prior mortgagee (*p*)
- Subsequent incumbrancers Pursuant to the general rule that all persons interested in the equity of redemption must be made parties to a redemption action, it seems clear on principle that a mortgagor seeking to redeem a prior mortgagee must make all subsequent incumbrancers parties; inasmuch as such incumbrancers have a right to

(*l*) *Ante*, pp 692 *et seq*
 (*i*) 44 & 45 Vict c 41, s 30 See as to copyholds, 50 & 51 Vict c 73, s 45, 57 & 58 Vict c 46, s 88
 (*m*) 1 Dan Ch Fr, 6th ed p 245, *Yates v Hambly*, 2 Atk 238

(*n*) 1 Dan Ch Fr 203 See *Chambers v Goldwin*, 9 Ves 268
 (*o*) *Hobart v Abbot*, 2 P Wms 643
 (*p*) *Lord Kensington v Bouverie*, 16 Beav 194

redeem, and are interested in seeing that the accounts between the mortgagee to be redeemed and the mortgagor are taken on a proper footing. CHAP XXXVIII

But the mortgagor is not a necessary party in a redemption action between his mortgagee and a derivative or sub-mortgagee (*q*). Sub-mort-gagee

In the case of redemption of a legal mortgage, a second mortgagee, having the best right to call for the legal estate, is interested in seeing that the decree shall provide for conveyance thereof to him. So it has been held that an equitable mortgagee, by deposit of title deeds, was a necessary party to a redemption suit (*r*); also judgment creditors who had taken out execution (*s*). Second mort-gagees, &c

If the mortgage is of an estate belonging to several tenants in common or of an undivided share of such estate, all the tenants in common must be made parties (*t*). Several mortgagors

Trustees, executors, and administrators may be plaintiffs or defendants to an action of foreclosure without joining their *cestuis que trust*, it being provided by the Rules of the Supreme Court, Ord XVI. r 8, that.— Trustees, executors, &c, may sue and be sued as representing estate.

“ Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons, but the Court or a judge may at any stage of the proceedings order any of such persons to be made parties either in addition to or in lieu of the previously existing parties ”

In a suit for redemption, bare trustees of the equity of redemption sufficiently represent the trust estate without the presence of the persons beneficially interested under Ord XVI. r 8, unless the Court otherwise directs (*u*).

Where trustees, seeking to set aside a mortgage, made their beneficiaries parties, it was held that the mortgagee, against whom a judgment had been made cancelling the security, had a right to appeal against an order that he should pay the costs of the beneficiaries, and such order was discharged (*x*).

As a general rule, persons who are merely interested in the Persons interested in the

(*q*) Seton, 1738

(*r*) *Waters v. Mynn*, 14 Jur 341

(*s*) *Adams v. Paynter*, 1 Coll 530,
Rolleston v. Morton, 1 Dr & War.

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(*t*) *Bolton v. Salmon*, (1891) 2 Ch 48

(*u*) *Jennings v. Jordan*, 6 App Cas
698

(*x*) *Re Cooper*, *Cooper v. Vesey*, 20
Ch D 611, C. A.

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mortgage money	
Legatees	But legatees, whose legacies were charged by the will of the mortgagor upon the equity of redemption, were held to be necessary parties to a redemption suit, instituted by the mortgagor's devisee, in which the mortgagee claimed an absolute title by virtue of the Statute of Limitations (z).
Representatives of bankrupt mortgagee	If creditors come in to redeem, on refusal of their trustee to enforce the right of redemption (a), they must make the persons legally entitled to the equity of redemption, such as executors or the trustee of a bankrupt, parties to their action (b).
Administrator of felon mortgagee	In case of felony or treason of the mortgagee, the administrator appointed by the Crown, or his <i>interim curator</i> , must be a party as representing the mortgagee (c).
Who must be parties where several mortgages are consolidated,	In cases not falling within sect 17 of the Conveyancing and Law of Property Act, 1881 (d), if mortgages of two different estates have been made by the same mortgagor to the same mortgagee at different dates, and in respect of distinct transactions, or if such mortgages become vested by assignment or otherwise in the same person, one of the estates cannot be redeemed without the other, and a subsequent purchaser of the equity of redemption of one of the estates takes subject to all the equities affecting the mortgagor; if, therefore, the equities of redemption of the two estates become vested in different persons by assignment or otherwise, the persons interested, subject to the mortgages, in both estates are necessary parties to an action for redemption (e).
—where equity of redemption is vested in several persons.	Where two estates are mortgaged together to the same person for securing the same sum of money, and subsequently the two estates, subject to the mortgage, become vested in different persons, the whole must be redeemed together, and the owner of the equity of redemption of one estate, claiming to redeem both estates, must make the persons interested in the equity of redemption of the other estate parties to his action (f).

(y) *Emmet v Tottenham*, 10 Jur. N. S. 1090.

(z) *Bachelor v Middleton*, 6 Ha. 75.

(a) See *ante*, p. 696.

(b) *Barn Ch R* 33.

(c) 33 & 34 Vict c 23, s 21.

(d) 44 & 45 Vict c. 41, s 17. As to

consolidation, see *post*, pp 855 *et seq*.

(e) *Ireson v Denn*, 2 Cox, 425, *Mills v. Jennings*, 13 Ch D 629, 641, 646, 647, O A., affirmed, *sub nom Jennings v Jordan*, 6 App Cas 698.

(f) *Cholmondeley v. Clinton*, 2 J & W 1, 134; *Exp Carter*, Amb 733.

Where real and personal estate were mortgaged together to secure the same debt, and the mortgagor died leaving a will of the personalty, but intestate as to real estate, and the executrix sought to redeem the whole of the mortgaged property without making the heir-at-law, who was not known, a party, it was held that, though if the heir could have been found he ought to have been a party, yet the Court would not, under the circumstances, delay making a decree until he was ascertained and made a party (*g*)

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Heir of mortgagor, when a proper party on redemption by executor

An action for redemption cannot be sustained by a person having a partial interest in the equity of redemption, in the absence of the other persons interested therein (*h*) Thus where the purchaser of a mortgage term of 200 years, created out of and determinable with the estate of a tenant for life, filed a bill to redeem a prior mortgage term of 1,000 years limited by the tenant for life under a power; it was held that the tenant for life was a necessary party to the bill, though his interest was merely nominal (*i*)

Persons having partial interests

Where executors have mortgaged real estate for payment of debts, they are not necessary or proper parties to a redemption suit, unless the equity of redemption is limited to them (*l*)

Mortgage of real estate by executors

To a suit for redemption by the heir of a mortgagor against a mortgagee in possession, alleging that he had been overpaid, the executor of the mortgagor is a necessary party (*l*)

Executor of mortgagor

Subsequent mortgagees cannot redeem without making the mortgagor, or his heir, a party to the action (*m*) in order to foreclose him, and if the heir be not within the jurisdiction of the Court, the cause cannot proceed, because the decree is, that the second mortgagee shall redeem the first, and the mortgagor, or his heir, shall redeem the second or be foreclosed (*n*) This principle is carried so far, that if a man mortgage an entire estate to A, which on the death of the mortgagor devolves on

Who must be parties to action by subsequent mortgagees for redemption

(*g*) *Hall v Heward*, 32 Ch D 430, C A

3 Y & C Ex 1

(*h*) *Henley v Stone*, 3 Beav 355, *Chamberlain v Thacker*, 14 Jur 190, *Chappell v Rees*, 1 De G M & G 393, *Cholmondeley v Clinton*, 2 J & W at p 134, *Bolton v Salmon*, (1891) 2 Ch 48, 52

(*l*) *Baker v Wetton*, 14 Sim 426, 9 Jur 98

(*i*) *Hunter v Mackleu*, 5 Ha 238, *quære*, if in this case the inheritance was represented

(*m*) *Thompson v Baskerville*, 3 Rep in Ch 215, *Fell v Brown*, 2 Bro C C 276, *Ramsbottom v Wallis*, 5 L J (N S) Ch 92 *Farmery v Curtis*, 2 Sim 466, *King v. Smith*, 1 Coll 555, *Rhodes v Buckland*, 16 Beav 212 See Seton, 1603

(*k*) *Greenwood v Rothwell*, 7 Beav 279 And see *Skeffington v Whitehurst*,

(*n*) See *sup* And see *Palk v Clinton*, 12 Ves 48, *Woodcock v Mayne*, cited 12 Ves 59, *Ramsbottom v Wallis*, *sup*

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two different persons, and one of those persons mortgages his part to another, and the mortgagee of that part brings his action to redeem, he must make not only the first mortgagee, and his own immediate mortgagor, but also the owner of the other share, parties to the action, because he must redeem the first mortgagee *in toto* (o), and the other party, so far as respects part of the estate, is standing in the place of the original mortgagor (p)

A second mortgagee might formerly have brought an action to redeem the first mortgagee without making subsequent incumbrancers parties, unless he sought to foreclose them (q); but the rule at the present time is different, as the form of judgment is that the *mesne* incumbrancers must successively redeem all prior to them or be foreclosed (r)

Whether
assignees
pendente lite
must be
parties

It would seem that an assignee *pendente lite* of the equity of redemption is generally a proper party, as having an interest in the subject-matter of the action, and being interested in the accounts. Indeed, it has been held that a redemption suit could not proceed in the absence of an assignee *pendente lite* of the plaintiff in the face of an objection of the defendant on that ground (s). But it may be doubted whether the assignee, if made a party, would stand in any better position than his assignor as regards any application for extension of time to redeem, or generally as to the terms of redemption, or whether he would be heard in support of his assignor's title to redeem, if contested by the defendant, on the ground of the Statutes of Limitation or otherwise. In these respects it is conceived that the general rule would apply, that an assignment *pendente lite* must not be allowed to vary or affect the rights of the parties to the action (t)

(o) 12 Ves 61

(p) *Palk v Clinton*, 12 Ves 48.

(q) *Bishop of Winchester v Paue*, 11 Ves 197

(r) Seton, 1645

(s) *Johnson v Thomas*, 11 Beav 501

See *Solomon v Solomon*, 13 Sim 516

(t) As to this rule, see *ante*, p 631.

SECTION III

JURISDICTION IN ACTIONS FOR REDEMPTION

i.—General Jurisdiction —By the Judicature Act, 1873 (*u*), actions for redemption are assigned to the Chancery Division of the High Court of Justice

Assignment of actions for redemption to Chancery Division

By the County Courts Act, 1888 (*x*), the County Courts have jurisdiction in all actions for redemption, where the mortgage or charge does not exceed 500*l* in amount

Jurisdiction of County Courts in redemption actions

An action by a mortgagor to set aside a sale and conveyance by the mortgagee of the mortgaged property is an action for redemption within the meaning of this Act (*y*)

Action to set aside sale by mortgagee

An action for redemption brought in a County Court must be commenced, where both the mortgagee and mortgagor dwell or carry on business in one or more of the metropolitan districts, either in the district in which the mortgagee dwells or carries on business, or in that in which the mortgagor dwells or carries on business (*z*) Elsewhere, in England and Wales, the action must be commenced in the Court within the district in which the lands, tenements, or hereditaments, or any part thereof, are situate

In what County Court action may be brought

The jurisdiction of the County Court is not affected by the fact that the mortgagor has become bankrupt (*a*).

Jurisdiction not affected by bankruptcy of mortgagor

ii.—Jurisdiction to order Sale in lieu of Redemption —By sect 25 of the Conveyancing and Law of Property Act, 1881 (*b*), it is enacted as follows —

“(1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative

Sale of mortgaged property in action for foreclosure, &c

“(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court on the request of the mortgagee, or of any

(*u*) 36 & 37 Vict c 66, s 34 (3)

(*x*) 51 & 52 Vict c 43, s 57

(*y*) *Powell v Roberts*, L R 9 Eq

169 (*z*) 51 & 52 Vict c 43, s 84 See

Reg v. Bloomsbury County Court, 24 Q B D 309

(*a*) *Madhurst v Golder*, 16 L T N S

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(*b*) 44 & 45 Vict c 41.

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person interested either in the mortgage money or in the right of redemption and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of sale, and to secure performance of the terms

“(3) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them

“(4) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

“(5) This section applies to actions brought either before or after the commencement of the Act.

“(6) The enactment described in Part II. of the Second Schedule to this Act (c) is hereby repealed

“(7) This section does not extend to Ireland ”

The Chancery Amendment Act (d), which enabled the Court to direct a sale in lieu of foreclosure, did not extend to actions brought by the mortgagor for redemption.

It will be observed that this section applies to foreclosure actions as well as to actions for redemption. Its application to the former class of cases will be considered later (e)

When order
may be made

An order for sale may, apparently, be made under this section in a redemption action at any time before the final decree for redemption (f).

The order may be made on an interlocutory application before the trial of the action (g)

(c) 15 & 16 Vict c 86, s 42, which gave jurisdiction only to order sale in lieu of foreclosure

(d) 15 & 16 Vict c 86, s 48

(e) See *post*, p 1016

(f) *Union Bank of London v Ingram*, 20 Ch D 463 (foreclosure action)

(g) *Woolley v Colman*, 21 Ch D 169

SECTION IV.

PROCEDURE AND PRACTICE IN AN ACTION FOR REDEMPTION.

i.—How a Redemption Action must be commenced—The Rules of the Supreme Court give the form of indorsement on writs to be used, with such modification as may be necessary, in actions for redemption claiming to have an account taken of what, if anything, is due on the mortgage, and to redeem the property comprised therein (*h*).

The plaintiff in a redemption action may now claim by his writ an order either for redemption alone, or for sale alone, or for sale or redemption in the alternative (*i*)

By Ord XVII. r. 2 of the Rules of 1875, it was provided that no cause of action (with certain exceptions) should, unless by leave of the Court, be joined with an action for recovery of land. The question whether actions for foreclosure or redemption were actions for recovery of land within the meaning of the rule gave rise to some conflict of judicial opinion (*j*).

Now, however, by Ord. XVIII. r. 2 of the Rules of the Supreme Court, it is provided as follows:—

“No cause of action shall, unless by leave of the Court or a judge, be joined with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed.

“Provided that nothing in this order contained shall prevent any plaintiff in an action for foreclosure or redemption from asking for recovery of land and joinder of claim for possession in

(*h*) R S C, App A, s 1 (5)
(*i*) 44 & 45 Vict c 41, s 25, set out
ante, pp 725, 726

(*j*) Cf *Tawell v Slate Co*, 3 Ch D 629, and *Hoar v. Lee*, W. N. (1884) 241.

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action for
foreclosure or
redemption.

ing for or obtaining an order against the defendant for delivery of the possession of the mortgaged property to the plaintiff on or after the order absolute for foreclosure or redemption, as the case may be, and such an action for foreclosure or redemption and for such delivery of possession shall not be deemed an action for the recovery of land within the meaning of these rules

“Provided also, that in case any mortgage security shall be foreclosed by reason of the default to redeem by any plaintiff in a redemption action, the defendant in whose favour such foreclosure has taken place may by motion or summons apply to the Court or a judge for an order for delivery to him of possession of the mortgaged property, and such order may be made thereupon as the justice of the case shall require”

Alternative
claim to set
aside mort-
gage

The plaintiff in a redemption action may, without obtaining the leave of the Court or a judge under this rule, ask in the alternative for a declaration that the mortgage is void, and for delivery of possession of the land on that footing (*l*).

Originating
summons for
redemption

By Ord LV r 5A of the Rules of the Supreme Court, any mortgagor, whether legal or equitable, or any person having the right to redeem any mortgage, whether legal or equitable, may take out as of course an originating summons returnable in the chambers of a judge of the Chancery Division for redemption, reconveyance and delivery of possession by the mortgagee

Proceedings for redemption should therefore now generally be commenced by originating summons. Where the defendant in a redemption action commenced by writ disputed the plaintiff's title to redeem, and the plaintiff obtained judgment, it was held that the plaintiff was entitled to such costs only as would have been allowed on an originating summons attended by counsel, including the costs of witnesses examined in Court (*m*).

Service of
summons

The persons to be served with a summons for redemption are to be such as would be the proper defendants to an action for the like relief (*n*); but service on other persons may be directed by the Court or a judge (*o*). If any of the defendants is out of the jurisdiction, an originating summons cannot be served on him, and accordingly in such case the action must be commenced by writ (*p*).

(*l*) *Hunt v Worsfold*, (1896) 2 Ch 224

(*m*) *Johnson v Evans* (No. 1), 60 L T 29.

(*n*) R S C, Ord LV r 5B.

(*o*) *Ibid*, r 6.

(*p*) *Re Busfield, Whaley v Busfield*, 32 Ch D 123, C A., *Re Bullen Smith, Berners v Bullen Smith*, 57 L T 924.

ii.—Pleadings in Action for Redemption.—An action for redemption not containing an offer to redeem was formerly demurrable (*g*), and will be dismissed at the hearing, unless the plaintiff offer to redeem on the same terms as a decree for redemption (*r*), though the action is brought by a devisee of the mortgaged estate to have the mortgage paid off out of other assets (*s*), unless the charge is a trust deed to secure incumbrances (*t*)

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Offer to
redeem .

If there is no offer to pay, the Court cannot order payment of what is found to be due (*u*)

A mortgagor is not entitled to a decree for redemption in an action which impeaches the mortgage securities and contains no prayer for redemption; but such rule does not apply where the issues are not merely mortgage or no mortgage, but whether the defendant, by means of his acts subsequent to the impeached mortgage, had ceased to be mortgagee, and had become absolute owner (*x*)

Mortgagor
impeaching
the security

And it would seem that the plaintiff might in the same action claim to have the mortgage deed set aside, or, in the alternative, to have redemption, if the deed should be upheld (*y*)

A mortgagee, in defending an action for redemption, may deny the title of the plaintiff to redeem, for, except as against a person who can show a good title to the estate of the mortgagor, the estate of the mortgagee is absolute (*z*). But where a mortgagee sets up a title adverse to the mortgage, he cannot, when he fails, fall back on the mortgage and claim the advantages of a mortgagee (*a*)

Conveyance by the mortgagor to the mortgagee of the equity of redemption is a defence to an action of redemption (*b*)

Release of
equity of
redemption

An agreement by a mortgagor to give up the equity of redemption, is not binding unless in writing, by virtue of the Statute of Frauds. But a parol agreement between several mortgagees, having deficient securities, with the executors of a deceased mort-

(*g*) *Dalton v Hayten*, 7 Beav 313,
Inman v Weaving, 3 De G & S 729,
Tasker v Small, 3 My & Cr 63

(*r*) *Goymour v Pigge*, 8 Jur 526,
Gordon v Dunstone, 5 Moo P C 393,
Harding v Tungey, 10 Jur N S
872.

(*s*) *Hughes v Cook*, 34 Beav 407

(*t*) *Jefferys v Dickson*, L R 1 Ch.
A 183

(*u*) *Hollis v Bulpett*, 13 W R 492

(*x*) *National Bank of Australasia v.
United Hand-in-Hand Co*, 4 App Cas.
391

(*y*) See R. S. C., Ord XX r 6.
And see *Bagot v Easton*, 7 Ch D 1,
C A., and cases there cited

(*z*) See *ante*, p 654 And see *Lomax
v. Bird*, 1 Vern 182

(*a*) *Incorporated Soc. v Richards*, 1
Dr & War 258, 334

(*b*) *Howells v Wilson*, 34 L J. Ch.
593

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gagor, to receive each a rateable payment out of the assets in satisfaction of their respective debts, is good, and is not vitiated by the fact of the agreement also providing that the several equities of redemption shall be barred and extinguished (c).

A release, if relied upon as a defence, must be raised by the pleadings (d).

A contract for the sale to the mortgagee of the equity of redemption is no defence to a redemption action (e); but it may now be the subject of counterclaim (f).

Mortgagee
in possession.

A mortgagee in possession, defendant in a redemption action, who admits that the plaintiff is entitled to a decree, must set out in his defence his accounts of rents and profits received by him (g).

A mortgagee in possession under a foreclosure decree may set up such possession as a defence to a redemption action (h); but such defence will only conclude such persons as were parties to the foreclosure action, and not subsequent incumbrancers who were not parties, unless, indeed, their incumbrances were made *pendente lite* (i).

Fraud.

Fraud will be a good defence to an action for redemption. The general rule of equity is, that the Court will render its assistance to all persons of the profits, and all persons claiming any share or interest in the equity of redemption, unless, indeed, their title may have been obtained by fraud, as in a case (k) in which a man having married an infant heiress, procured her to levy a fine, and the father of the husband was one of the commissioners who took the fine, the use of which was declared, on failure of their issue, to the survivor in fee; the wife died without issue, and an infant; the husband afterwards made a mortgage in fee, and died, on which the equity of redemption descended on his uncle, and from him on the father of the husband, and from him on the wife of the plaintiff. The defendant was the heir of the wife, who had bought in the mortgage, and obtained possession of the title deeds, and got into possession, and, being in possession, had levied a fine, and five years had passed. The deed declaring the uses of the first fine was lost. The bill was

(c) *Massey v. Johnson*, 1 Exch. 241.

(d) R. S. C., Ord. XIX. r. 15.

(e) *Howells v. Wilson*, 34 Beav. 573.

(f) R. S. C., Ord. XIX. r. 3.

(g) *Elmer v. Creasy*, L. R. 9 Ch. A. 69.

(h) *Whithals v. Short*, 2 Eq. Ca.

Abr. 608, *S. C.*, sub nom. *Nicholls v. Short*, 15 Vin. Abr. tit. "Mortgage," 478.

(i) *Bishop of Winchester v. Paine*, 11 Ves. 194.

(k) *Parkington v. Barrow*, Prec. Ch. 216.

filed by the plaintiff and wife for a discovery of the deed, and a redemption. The defendant pleaded the ill-practices used in obtaining the first fine, and also his own fine and the non-claim, and that there was no such deed as the bill sought, or if there was, it was obtained by fraud. The plaintiffs proved the execution of the deed. The Court said, that the father, in taking the fine from his daughter-in-law, could not have been aided in equity, and the plaintiffs claimed under him. The bill was dismissed.

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It will be a good defence to an action to redeem a *pursne* mortgage to show that the mortgagor has made that mortgage without discovering a prior mortgage or judgment. In such a case the mortgagor forfeits all right to redeem the *pursne* mortgage, but the *pursne* mortgagee is not barred from redeeming any prior incumbrance (l).

So, the *mala fides* of a pledgor, in permitting the pledgee to deal with the property as his own, may be a ground for equity not interposing to prevent a sale of the property being made by a sub-pledgee (m).

Fraud, if relied upon as a defence, must be raised by the pleadings (n).

It is a good defence to a redemption action that the mortgagor's right to redeem is barred by lapse of time (o). Statutes of Limitation

In all cases, a defendant who relies on the Statute of Limitations must expressly raise the defence by his pleadings (p); and the plaintiff, as a general rule, may reply to the plea, or amend his action, or may prove himself to be within the exceptions to the operation of the statute (q). But in the case of a mortgage of land, if the mortgagor's statement of claim shows upon the face of it that the time within which the title to the land must be asserted has elapsed, the action would formerly have been demurrable (r), and will now be disposed of by proceedings in lieu of demurrer (s).

Where the bill for redemption stated that the mortgagee entered into possession shortly after the date of the mortgage,

(l) 4 & 5 Will & M c. 16, *ante*, p. 45.

(m) *Nicholson v Hooper*, 4 My & Cr. 179.

(n) R S C, Ord. XIX r 15.

(o) See *post*, pp 740 *et seq*.

(p) R S C, Ord XIX r 15.

(q) *Aggas v Pokenall*, 3 Atk 225.

(r) *Dawkins v Lord Penrhyn*, 4 App Cas 51.

(s) R S C, Ord XXV.

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and had remained in possession ever since, the Court would not infer that "shortly after" meant within five years, and the demurrer of the mortgagee was overruled (*t*) It must clearly appear that the possession vested for the statutory period (*u*)

Laches.

Unless the statutory period has elapsed, the mere delay of the mortgagor in taking proceedings to determine that a conveyance, on the face of it absolute, is really a mortgage, is no bar to an action claiming a declaration to that effect, and redemption (*x*).

Interrogatories

iii.—Discovery —A mortgagee is compellable in an action for redemption to furnish particulars of the amount claimed to be due on the mortgage, but he need not make a statement of the deeds by which the mortgage became vested in him (*y*) It was held, however, in an action for redemption by a second mortgagee against a first mortgagee, that the defendant was bound to state, in answer to interrogatories, not only the amount due, but also what securities he held for the debt (*z*)

Where the mortgage was made since the 31st of December, 1881, the mortgagor is entitled, so long as his right to redeem subsists, at his own cost, to inspect and take copies or abstracts of, or extracts from, the documents of title in the mortgagee's custody or power relating to the mortgaged property.

Production of title deeds, &c

In cases not falling within the above enactment, the mortgagee is not in general bound to produce the title deeds unless he is redeemed (*a*). Under special circumstances, however, the mortgagee has been ordered to produce the mortgage deed at the hearing for the purpose of proof, but the mortgagor was not allowed to see it for any other purpose, or to have it left with the officer of the Court (*b*) Production before the examiner for the purpose of proof has also been ordered (*c*), without prejudice to the question as to production at the hearing.

(*t*) *Baker v Wetton*, 14 Sim 426

(*u*) *Green v Nicholls*, 4 L. J. Ch. 118

(*x*) *Douglas v. Culverwell*, 4 De G. F. & J. 20

(*y*) *Bridgewater v De Winton*, 33 L. J. Ch. 238

(*z*) *West of England, &c Bank v. Nicholls*, 6 Ch. D. 613, *sed qu.*

(*a*) *Cannock v Jauncey*, 1 Drew 497, *Greenwood v Rothwell*, 7 Beav 279, 291, *Chichester v Managess of Donegal*, L. R. 5 Ch. A. 497

(*b*) *Beaumont v Foster*, 5 L. J. (N. S.) Ch. 4, *McComb v —*, 5 L. J. N. S. 2

(*c*) *Sparks v Montrou*, 1 Y. & C. Ex. 103

A mortgagee, who is ordered to produce a deed, must produce everything which depends upon it (*d*). Therefore, in a suit to set aside a conveyance of an equity of redemption, it was held that the defendant must with the deed produce a receipt for the mortgage money which he had obtained after the date of the conveyance

If a mortgagee plead the Statute of Limitations (*e*), he is in the same position as to the liability to produce his deeds as any other defendant who cannot shelter himself under a mortgage title

If a mortgagee take a conveyance of the equity of redemption from a trustee with notice of the trust, he must produce the conveyance in a suit by the *cestuis que trust* for redemption, though one of the trusts was for sale (*f*).



SECTION V

DECREE FOR REDEMPTION.

i.—Form of Decree—The ordinary form of judgment in a redemption action in its simplest form directs an account to be taken of what is due to the defendant under and by virtue of his mortgage, and for the costs of the action (such costs to be taxed, &c), and that, upon the plaintiff paying the defendant what shall be certified to be due to him within six months, the defendant shall reconvey the mortgaged property free from incumbrances and deliver up all deeds, but that, in default of payment within the time fixed, the action shall be dismissed, with liberty to apply (*g*).

Ordinary
form of
decree

If the right to redeem is disputed, the judgment will be prefaced by a declaration, affirming the right to redeem. And

Declaration
of right to
redeem

(*d*) *Jones v Jones*, Kay, App vi

(*e*) *Parkinson v Chambers*, 1 K & J

72 And see *Jones v Jones*, *sup*

(*f*) *Smith v Barnes*, L R 1 Eq.

(*g*) Seton, 1593 For form of decree for redemption of a mortgage of a pension, see *James v Ellis*, 19 W R 319

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the judgment may also declare, where necessary, the rights and priorities as well of the several incumbrances as of any person who has paramount claims on the estate (*l*); and may further direct that the necessary accounts be taken in a particular manner, as, where necessary, that rests be made (*l*), and that the amount due from the mortgagee on account of his receipts be applied first in payment of interest and then of the principal of the mortgage security (*m*)

Where in a redemption action the mortgagee fails to appear, and the mortgagor takes out a summons under r 1 of Ord XV, for proper accounts, the order must be restricted to accounts of the sum due by the mortgagor, and of the rents due by the mortgagee; the rest of the decree must be adjourned (*n*)

It may also be directed, in a proper case, that the amount due to each mortgagee in respect of his own debt be added to whatever he may have paid for the redemption of preceding incumbrancers, together with all sums to which the Court may consider him to be entitled for improvements, or payments made in respect, or for the protection, of his security or of the estate

Time allowed
for redemption

The time allowed by the judgment for redemption is, as a general rule, six months, as in an action for foreclosure (*o*), but as in a redemption action the mortgagor takes the initiative, he may, under special circumstances, be put upon terms, as by being ordered to pay the estimated amount due for principal, interest, and costs into Court by a shorter date

As a general rule, the time for payment will not be enlarged in a redemption action as in an action for foreclosure, unless special grounds for such indulgence are shown. The difference in principle between the two classes of cases is that the plaintiff in a redemption action comes into Court professing that his money is ready and asking for his estate in return, but a foreclosing mortgagee calls upon the Court to act against a person unwilling to pay (*p*).

Effect of
default

If, accordingly, the mortgagor do not pay the sum due at the time appointed in the redemption suit, he will not be allowed to redeem, although he tender the money before the motion to

(*k*) *Jones v Griffith*, 2 Coll 207.

(*l*) See as to rests, *post*, p 1207

(*m*) See *Thornycroft v. Crockett*, 2 H. L. C 246.

(*n*) *Clover v Wilts, &c Soc*, W. N. (1884) 110

(*o*) *Post*, p 1027

(*p*) *Moosvelsh v Wakefield*, 17 Ves 417, *Faulkner v Bolton*, 7 Sim 319

dismiss the action (*q*), unless, as it seems, good cause is shown for the delay (*r*) CHAP XXXVIII.

But where in a redemption action, an order was made giving leave to the plaintiff to lodge the mortgage moneys in Court, and directing that in default of such lodgment within two months from the date of the order, the action be dismissed; owing to a *bonâ fide* mistake of the plaintiff's solicitor this period was allowed to lapse, but the money was lodged within two months from the date on which the order was passed and entered, the Court extended the period allowed by the order so as to include the latter date (*s*).

Redemption, where there are several parties entitled, will be decreed according to the priorities of the claimants; that is, if there are several mortgagees, the Court will decree in detail that the second shall redeem the first, the third the second, and so on (*t*) Successive redemptions

If the equity of redemption be limited to uses, the remainderman may bring his action to redeem (*u*); but he must give the first tenant for life and intermediate remaindermen an option of redeeming according to their priorities (*x*) The tenant for life has the first option to redeem; and if he procures an assignment of the mortgage, or if the mortgagee purchases the interest of the tenant for life, it seems that the remainderman cannot, without the consent of the tenant for life or his assignee, redeem the mortgage (*y*) Tenant for life and remainderman

The tenant for life can only be compelled to keep down the interest during his life (*z*); but if the tenant for life refuse to redeem, the remainderman may, by redeeming the mortgage, and ejecting the tenant for life, and taking possession of the profits, or by bringing an action of foreclosure, compel the tenant for life to come in and contribute, or give up the possession of the estate (*a*). Contribution by tenant for life on redemption by remainderman

It was formerly the rule, that the tenant for life should pay

(*q*) *Faulkner v Bolton*, 7 Sim 319
 304 (*r*) See *Jones v Creswicke*, 9 Sim
 644 (*s*) *Collinson v Jeffery*, (1896) 1 Ch
 644 (*t*) *Arohedeeke v Bowes*, M'C 153
 And see *Ramsbottom v Wallis*, 5 L. J
 (N S) Ch 92 See as to orders for
 successive redemptions and fore-
 closures, *post*, p 1027
 (*u*) See *Corbett v Barker*, 1 Anst 138,

3 Anst 755, and *ante*, p 699
 (*x*) *Raffety v King*, 1 Keen, 601, 618
 (*y*) *Raffety v King*, *sup* See *Ravald*
 v *Russel*, Yo 9, 21
 (*z*) *Ante*, p 638
 (*a*) *Hayes v. Hayes*, 1 Ch Ca 224,
Cornish v Mew, 1 Ch Ca 271, *Olyat*
 v *Baiteson*, 1 Vern 404, *Ballett v.*
Spianger, Prec Ch. 62, *Rowel v Wal-*
ley, 1 Rep in Ch 116 And see 3
 Anst 757

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one-third, and the remainderman two-thirds (*b*); and in one case it was decreed that the tenant for life should contribute two-fifths, and the remainderman three-fifths (*c*). The usual course now is a reference to chambers to state the amount of contribution (*d*).

Redemption of annuity.

In an action for redemption of an annuity, the principle of the common order is applied (*e*).

Motion to dismiss action for redemption

ii.—Dismissal of Action for Redemption—The suit for redemption will be dismissed on motion of course, upon production of the certificate of the amount due, and of an affidavit of attendance and non-payment of the money (*f*), even though after the time fixed for payment the mortgagor have tendered the principal and interest, with an additional sum for interest to the day of tender (*g*), unless under special circumstances (*h*). But it seems proper in such a case to move upon notice.

Effect of dismissal of action

If the money be not duly paid and the redemption action be accordingly dismissed, the mortgagee thereupon becomes entitled to hold the estate free from the mortgage debt in respect of which default has been made. A final decree dismissing an action for the redemption of a legal mortgage, is equivalent to a decree for foreclosure (*i*). But this rule does not apply to the dismissal of an action for the redemption of an equitable mortgage by deposit of title deeds (*j*); and the dismissal of a redemption action for want of prosecution has not the effect of a decree for foreclosure, but leaves the mortgagor at liberty to commence a fresh action for redemption (*k*).

Who bound by dismissal

The dismissal of an order for redemption will bind not only the mortgagor and his heirs, but also a purchaser of the equity of redemption after commencement of the action (*l*), provided the action is duly registered as a *lis pendens* (*m*).

Where, pending a suit by a mortgagor for redemption, the plaintiff became insolvent, and his assignees were not made parties to the suit, it was held that the assignees were not bound

(*b*) *Rowel v Walley*, 1 Rep in Ch 116

(*c*) *James v Hales*, 2 Vern 268

(*d*) 1 Pow Mtg by Cov 314 a.

(*e*) *Moore v Rowe*, and *Byne v Pwman*, cited Seton, 1759

(*f*) *Stuart v Worrall*, 1 Bro C C 581, *Proctor v Oates*, 2 Atk 140, *Newsham v Gray*, 2 Atk 287

(*g*) *Faulkner v Bolton*, 7 Sm 319, the report in 4 L. J. (N S) Ch 81, is incorrect

(*h*) *Collinson v Jeffery*, (1896) 1 Ch 644

(*i*) *Cholmley v Countess of Oxford*, 2 Atk 267, *Bishop of Winchester v Paine*, 11 Ves 194, 199, *Inman v Weaving*, 3 De G & S 734

(*j*) *Marshall v Shrewsbury*, L R 10 Ch A 250

(*k*) *Hansard v Hardy*, 18 Ves 460

(*l*) *Garth v Ward*, 2 Atk 175

(*m*) 2 & 3 Vict c 11, s 7

by the foreclosure occasioned by the dismissal of the mortgagor's bill to redeem, in consequence of his failing to pay the amount found due at the time appointed (*n*).

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In an action by a second mortgagee to redeem a first mortgage and foreclosure the mortgagor, the proper form of judgment is, that in default of the plaintiff redeeming, the action is to stand dismissed with costs (*o*).

Dismissal of action by *præsumptio* mortgagee,

Where one person has mortgaged his estate as a surety for another, the judgment is so framed as to give the surety the full benefit of his rights against the estate of the principal debtor, and the right of redemption being given to both, it is ordered that if the money be paid by the principal debtor, the estates shall be conveyed to their respective owners; but if the money be paid by the surety, both estates are conveyed to him, and he, of course, holds that which belonged to his principal, subject to redemption by him; if neither principal nor surety redeem both, their estates are foreclosed (*p*).

—by surety

If the plaintiff be an infant, and bring his action to redeem, and a day is given for that purpose, and default made in payment, and the action consequently dismissed, it does not seem clear whether the infant will be bound, or will have six months after he comes of age to show cause (*q*).

Dismissal of infant's action

The right of redemption being a creature of equity must be subject to the rules of equity. The Court, therefore, will make terms with the mortgagor, if necessary, before it permits him to redeem; and the decree for redemption will be either absolute or conditional, as suits the circumstances of the case. Of this, an instance occurs (*r*) in which a mortgagee, having purchased the estate for a valuable consideration, a third party made adverse claim to the right of redemption, but was desirous of having the validity of the mortgage tried at law before he should redeem, the Court held that he ought to declare whether he would redeem or not before he disputed the title, and that if he would redeem he ought to pay the defendant all his principal money, damages, and costs, which, he refusing, the Court dismissed the bill: and in another case (*s*), in which an infant heir of a mortgagor, by his

Decree for redemption on terms

(*n*) *Wood v. Surr*, 19 Beav. 551.

(*o*) *Hallett v. Furze*, 31 Ch. D. 312.

(*p*) *Beckett v. Micklethwaite*, 6 Madd. 199, Set Dec. 3rd ed. p. 417, *Alldworth v. Robinson*, 2 Beav. 287.

(*q*) See *Gregory v. Molesworth*, 3 Atk. 625, *Nayler v. Effingham*, 2 P. Wms.

401. As to the right of an infant defendant to a foreclosure action to a day to show cause, see *post*, p. 1052.

(*r*) *Smith v. Valence*, 1 Rep. in Ch. 90. And see *Goodtitle v. Bailey*, Cowp. 601.

(*s*) *Ramsden v. Langley*, 2 Vern. 536.

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guardian, having fruitlessly endeavoured by proceedings at law to overthrow the mortgagee's title, brought his bill to redeem, the Court would not allow redemption, unless the mortgagor would pay a sum of money which the mortgagee, on his oath, declared he had paid above his taxed costs, in defending the title at law, and the Court also allowed him his costs of taking out administration to the mortgagor as principal creditor.

Dismissal of
action where
several in-
cumbrancers.

Where there are several incumbrancers, and the mortgagor's action for redemption is dismissed, the last incumbrancer becomes *quasi* mortgagor, and the others become first and subsequent incumbrancers according to their priorities (*t*).

Conduct of
sale

iii.—Order for Sale in lieu of Redemption.—The conduct of a sale is always in the discretion of the Court, but, in a redemption action where a sale is prayed, it seems that the conduct will be given to the plaintiff, on the ground that he is more interested in obtaining the best price for the property (*u*). The sale may be ordered to be made out of Court (*x*); a reserve price may be fixed to cover the amount due on incumbrances; and the plaintiff may be ordered to give security for the costs of the sale (*y*).

Trustee Act,
1893, s 39

By sect. 30 of the Trustee Act, 1893 (*z*), it is enacted as follows:—

Vesting order
consequential
on judgment
for sale on
mortgage of
land

“Where any Court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land or entitled to a contingent right therein [as heir, or under the will of a deceased person for payment of whose debts the judgment was given or order made], and is a party to the action or proceeding in which the judgment or order is given or made, or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this Act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that Court thinks fit in the purchaser or mortgagor or in any other person.”

This section virtually re-enacts (*a*) the repealed provisions contained in sect. 29 of the Trustee Act, 1850 (*b*), and sect. 1 of the Trustee Act, 1852 (*c*).

(*t*) *Cottingham v Earl of Shrewsbury*, 3 Ha 637

(*u*) *Brewer v. Square*, (1892) 2 Ch 111

(*x*) *Davies v Wright*, 32 Ch D 220 (foreclosure action), *Brewer v Square*, *sup*

(*y*) *Woolley v Colman*, 21 Ch D 169

(*z*) 56 & 57 Vict c 53. The words in brackets are repealed by the statute

57 Vict. c 10, s 1

(*a*) The only material variations are (1) that the power to make vesting orders is given to the High Court generally, and not only to courts of equity, and (2) that the power is extended to cases where the Court orders a mortgage

(*b*) 13 & 14 Vict c 60

(*c*) 15 & 16 Vict c 55

The power of the Court to make vesting orders is not confined to cases of persons under disability (*d*); it extends to the case of a person of unsound mind, but not found lunatic (*e*). CHAP. XXXVIII

Where property is sold in lots, the purchasers may apply for a vesting order, and the costs of each purchaser will be paid out of the proceeds of his particular lot, not out of the fund in Court generally (*f*).

Formerly, applications under the Trustee Acts had to be made by petition, but such applications may now be made by summons in Chambers (*g*).

iv.—Costs—In a suit for redemption, the plaintiff pays his own costs, and the defendant adds his to his mortgage debt (*h*).

Where taxation of the costs of the mortgagee is sought after payment, the application must be against the mortgagee, and not against his solicitor (*i*).

In the decree for redemption, the costs of a prior foreclosure suit must be provided for (*h*).

The scale of taxation in a mortgage suit is regulated by the amount due at the commencement of the litigation, and not the amount of the original debt (*l*), and in administration suits, by the gross value of the estate to be administered (*m*); but the value of the equity of redemption only is estimated, not that of the entire mortgaged estate (*n*); and if the real value turns out to be less than the higher scale, in consequence of a sale by the mortgagee, the scale will be reduced accordingly (*n*).

(*d*) *Beckett v Sutton*, 19 Ch D 646

(*e*) *Herring v Clark*, L. R. 4 Ch A 167

(*f*) *Ayles v. Cox*, 17 Beav 504

(*g*) R S C, Ord LV r 2 (8)

(*h*) The question as to what costs are allowed to a mortgagee will be considered fully, *post*, Chap LIV

Sect iv pp 1174 *et seq*

(*i*) *Re Abbott*, 4 L T N S 576

(*h*) *Ainsworth v Roe*, 14 Jur 874

(*l*) *Cotterell v Stratton*, L R 9 Ch A 514

(*m*) *Re Reece's Estate, Gould v. Dummett*, L R 2 Eq 609

(*n*) *Re Sanderson*, 7 Ch D. 177

CHAPTER XXXIX

OF THE STATUTES OF LIMITATION IN BAR OF REDEMPTION.

Statutory
limit to entry
on lands
under statute
of Jac I

i.—Application of the Statutes to Claims for Redemption.—The statute 21 Jac I c 16, s 1, enacted that no entry into any lands, tenements, or hereditaments should be made but within twenty years after the right or title to the same should accrue or descend. This section was superseded by the statute 3 & 4 Will IV. c 27, and was ultimately repealed by the Statute Law Revision Act, 1863.

Analogous
principles
adopted in
equity

The older statute did not affect claims which could only be brought in a Court of Equity (a). But even prior to the statute 3 & 4 Will IV c. 27, the time within which the equity of redemption of land or rents would be allowed was a matter for consideration; and after considerable conflict of opinion, it was settled that the Courts of Equity would be regulated in this respect by analogy to the old Statute of Limitations, and that after twenty years' abandonment by the mortgagor (b), the right of redemption should be lost, unless the mortgagor could bring his case within one of the exceptions mentioned in that statute, namely, imprisonment, infancy, coverture (c), or being beyond the seas (not having absconded), or nonsane memory; in any one of which cases, the Courts, by further analogy to that statute, gave ten years after the disability was removed (d). But if the time once began to run, a subsequent legal disability, by analogy to the decisions at law, would not have been sufficient to stop it (e).

(a) *Bonney v Ridgard*, 1 Cox, 149.
(b) *Corbett v Barker*, 1 Anst. 138,
3 Anst 755, *Bonney v Ridgard*, *sup*,
Whiting v White, 2 Cox, 290, G Coop
1; *Barrow v Martin*, 19 Ves 327,
Hodds v Healey, 1 V. & B 536,
Hovenden v Lord Annesley, 2 Sch &
L 636, *Marquis Cholmondeley v Lord*
Clinton, 2 J. & W 191, *Harrison v*
Hollins, 1 S & St 471.

(c) *Cornel v Sykes*, 1 Rep in Ch
193, *Price v Cogner*, 1 S & St. 347.
(d) *White v Ewer*, 2 Vent 340,
Belch v Harvey, 3 P. Wms 287, n
And see *Beckford v Wade*, 17 Ves 99.
(e) *Floyd v Mansel*, Grib Eq Rep
185, *St John v Turner*, 2 Vern
418, *Knowles v Spence*, Mos 225, 1
Eq Ca Abr 315, pl 5, *Corbett v.*
Barker, 1 Anst. 138.

By the statute 3 & 4 Will IV. c. 27, s. 28, the law on this subject was made clear and precise, and the period within which suits for redemption of mortgaged lands or rents must be brought was fixed at twenty years next after the mortgagee took possession, or from the last written acknowledgment of the mortgagor's title or of his right to redemption.

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Stat 3 & 4
Will IV
c 27, s 28.

This section has been repealed by the Real Property Limitation Act, 1874 (*f*); but its provisions have been substantially re-enacted, the general period of redemption being reduced to twelve years.

Repeal.

As regards the redemption of mortgages of personalty other than leaseholds, the Statutes of Limitation would seem to have no direct application. The statutes 3 & 4 Will IV. c. 27, s. 28, and 37 & 38 Vict. c. 57, s. 7, apply only to suits to redeem mortgages of land and rents; and sect 8 of the Trustee Act, 1888 (*g*), which enables trustees to plead lapse of time as a bar to an action for the recovery of any property, does not apparently extend to mortgagees (*h*), so as to cause such lapse to bar a right of redemption in cases where such right would not have been barred independently of that Act. The statute 21 Jac I c. 16, s. 3, does indeed bar claims after six years to (among other actions) an action for account, and it might be said that a suit for redemption necessarily involves a claim for an account from the mortgagee in possession. But in this statute, the term "action" must be strictly construed as meaning an action at law (*i*); and, even since the Judicature Acts, though actions which must formerly have been brought only in a common law Court may generally be now brought in any Division of the High Court, yet it has been said that those Acts did not alter or touch the Statutes of Limitation at all, and that these statutes still apply to the circumstances which constituted the actions named in it (*k*). It is obvious that the circumstances of a mortgage transaction would not have supported an action for account at common law under the former practice, and thus it would appear that this Act of Jac I. does not apply, and consequently there is no statutory limitation of time within which a claim

No statutory
limit to suits
for redemp-
tion of
mortgaged
personalty

(*f*) 37 & 38 Vict c 57, s 9

(*g*) 51 & 52 Vict c 59

(*h*) See sect 1 of the Act

(*i*) See, *per* Jessel, M R, in *Re Graves, Bray v Tofteld*, 18 Ch D. 551, at p 554.

(*k*) *Per* Brett, L J, in *Gibbs v Guild*, 9 Q. B D 59, C A, at p 67. See *Re Sharpe, Mason, & Ass Co v Sharpe*, (1892) 1 Ch 154, C A, at p 167.

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Analogy of
principle of
statute of
Jac I
applied

must be brought to redeem mortgaged personalty other than leaseholds.

But the Court has, in several recent cases, recognized and applied, with respect to equitable claims to personalty, the principle that where there is a remedy in equity corresponding or analogous to a remedy at law, which is subject by statute to a limit in point of time, equity will act by analogy to the statute, and impose on the remedy it affords a similar limit (2). If the mortgaged personalty had remained legally vested in the mortgagor, he could, under the statute of Jac I, have brought an action of detinue and for account at law, subject to the limit of six years imposed by that Act; and it would seem that his right to claim redemption, on payment of the amount which should be found due for principal, interest, and costs, is a corresponding or analogous right in equity which would be subject to the same limit in point of time as the right of action would have been subject to at common law. This point does not seem to have arisen in any reported case, but the analogy of the statute was recognized in the case of a contract to execute a mortgage, where an action for damages for breach of such contract would have been barred by the statute of Jac I., but for certain letters of the defendant, which were held to contain a sufficient admission of his liability to take the case out of the principle of the statute (m).

Mortgagors
to be barred
at end of
twelve years
from the time
when the
mortgagees
took posses-
sion, or from
the last
written ac-
knowledg-
ment

ii.—Bar of Actions for Redemption after Twelve Years' Possession.—By the Real Property Limitation Act, 1874, it is enacted as follows:—

Sect 7. "When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, signed by the mortgagee or the person claiming through him, and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if

(2) *Knox v. Gye*, L R. 5 H. L. 674,
Peck v. Gurney, L R. 6 H. L. 377,
Rule v. Jewell, 18 Ch. D. 667; *Re*
Hastings, *Hastings v. Hastings*, 35 Ch.

D. 105, C. A., *Allead v. Skinner*, 36
Ch. D. 186, C. A., *Book v. Pierce*, 23
Q. B. D. 322, C. A.

(m) *Firth v. Shingaby*, 58 L. T. 483.

more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons, but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgments, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent, and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money, as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage."

Sect. 1 of the statute 3 & 4 Will. IV. c. 27, contains the following definitions of expressions used in the Act:—

"The words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows (that is to say). the word 'land' shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word 'rent' shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee,

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devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat, and the word 'persons' shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual, and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing, and every word importing the masculine gender only shall extend and be applied to a female as well as a male"

"Rent"

The expression "rent" includes quit rents (*n*), and also tithe rent-charge (*o*)

Trusts
for sale

A trust for sale of land as a security for money lent is a mortgage within this section, and not an express trust within the meaning of the 25th section of the statute (*p*)

Sale with
right to
re-purchase

In *Alderson v White* (*q*), Lord Cranworth said that he was disposed to think that the statute could not apply so as to make the mere possession by the mortgagee for twenty years without acknowledgment a bar to redemption where the original contract was that the mortgagor may redeem at any time during the period extending beyond the ten (now twelve) years; but the determination of this question was unnecessary in the case referred to, as the instrument in question was held to be a conditional sale, and not a mortgage

Welsh
mortgage

It has been seen (*r*) that in the case of a Welsh mortgage it is of the essence of the contract that the mortgagee shall hold possession of the land until the mortgage is fully satisfied. Accordingly, it has been held that no time would bar the redemption of a Welsh mortgage (*s*), or of a mortgage, where the deed contained an agreement that the mortgagee should hold until the mortgage was satisfied (*t*), unless on an account taken of the rents and profits it appeared that the mortgagee had been in possession upwards of twenty years since the mortgage debt was fully paid (*u*). But a plaintiff who seeks to redeem a

(*n*) *De Beauvoir v Owen*, 5 Exch 166, *Lord Chichester v Hall*, 17 L T 121

(*o*) *Irish Land Commission v Grant*, 10 App Cas 14

(*p*) *Locking v Parker*, L R 8 Ch A 30, *Re Alison*, *Johnson v Mounsey*, 11 Ch. D 284, C A. And see *Kirkwood v Thompson*, 2 H & M 392, *Bennett v Cooper*, 9 Beav. 252

(*q*) 2 De G & J 97

(*r*) *Ante*, p 27

(*s*) *Howel v Price*, 1 P Wms 291

(*t*) *Orde v Hemmings*, 1 Vern 418, *Yates v Hamblly*, 2 Atk 360

(*u*) *Yates v Hamblly*, *sup*. See *Walter v Webb*, L R 5 Ch A 533. And see *Fenwick v Reed*, 1 Mer. 125, and *ante*, p 28

mortgage alleged to be of this nature after many years must prove his case clearly and indefeasibly (*x*)

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Where a mortgagee has been in undisturbed possession of part of the land comprised in the mortgage for the statutory period, the mortgagor's right to redeem that part is barred, though he held possession of the remainder of the land (*y*)
The rule before the statute of Will IV. was different (*z*)

Mortgagee in possession of part

Time will not run in the case of a mortgage until the day of redemption has arrived, for the mortgagor cannot redeem before that day (*a*)

Time will not run till default

In order to bar a right to bring an action for redemption of land, the possession of twelve years must be of the same person or of several persons claiming one from or under the other by conveyance, will, or descent (*b*).

Possession must be of same person or of those claiming under him

So, where a mortgagor's solicitor, out of his own moneys, paid off the mortgage debt due from his client, without taking any assignment of the debt and the security for the same, and received the rents and profits, it was held that he must be taken to have acted as agent of the mortgagor, and that the possession must be taken to be that of the mortgagor, so that time would not run against him (*c*)

Conversely, the statute will apply not only as against the mortgagor, but as against all persons claiming under him So, if a person by his will devises his lands in settlement, and then mortgages the lands, the statutory period will run from the time when the mortgagee enters into possession against the mortgagor himself and his successive devisees (*d*).

Possession bars all claiming under mortgagor

Time will not run against the mortgagor under this Act, as it did not under the old law, during the time that the mortgagee is in possession under some other rightful title; as where the mortgagee, after being seven years in possession without acknowledgment purchased the estate of the tenant for life who had joined with the remainderman in making the mortgage (*e*), or

Mortgagee in possession under another title

(*x*) *Sevay v Chinna*, 10 Moo I A. 151

(*y*) *Kinsman v. Rouse*, 17 Ch D. 104.

(*z*) *Rakestraw v Brewen*, 2 P Wms 511, *Burke v Lynch*, 2 Ba & Be 426

(*a*) *Brown v Cole*, 14 Sim 427

(*b*) *Doe v. Barnard*, 13 Q B. 952

(*c*) *Ward v Cantlar*, L. R 1 Eq 29.

(*d*) *Browne v Bishop of Cork*, 1 Dr & Wal 700 See *Raffety v King*, 1 Keen, 601

(*e*) *Hyde v Dallaway*, 2 Ha 528 And see *Ravall v. Russell*, Y 9, *Raffety v. King*, 1 Keen, 601, 616, 617, *Corbett v. Barker*, 3 Anst 755, *Reeve v Hicks*, 2 S & St. 403.

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Possession
after pre-
sumed death
of tenant
for life.

the estate of a tenant by the courtesy or otherwise, whether he acquired the interest before (*f*) or after (*g*) taking possession.

Where a mortgagee of a life estate is in possession under an order of Court, and remains in possession after the death of the tenant for life has been presumed, he is not a trespasser, and the statute does not run in his favour (*h*), and the persons claiming in remainder are guilty of no laches in not suing till the expiration of seven years from the time when the tenant for life was last heard of; but as no fiduciary relation existed between them and the mortgagee, they were only entitled to an account of rents for six years (*i*).

Joint posses-
sion of hus-
band and
wife

So where the equity of redemption was vested in the husband and wife jointly, and they conveyed by deed without fine to a mortgagee, the mortgagee's estate could only become absolute if the husband survived, and, the wife having survived, her heir was entitled to claim within twenty years from the death of the husband (*k*).

Possession of
husband as
mortgagee

Where a husband, separated from his wife, became mortgagee of her separate estate, and continued in possession for over twenty years, it was held that the wife's right to redeem was not barred by the statute (*l*).

Where several
persons are
successively
entitled to
equity of
redemption.

It was held that time would run against the remainderman, notwithstanding the neglect of persons with the prior estate. The antiquity of the defendant's possession is more to be regarded than the novel acquirer of the plaintiff's title (*m*). So, in *Harrison v. Hollins* (*n*), it was decided that the equity of redemption would be barred by twenty years' non-claim, although the mortgagee entered into possession in the lifetime of a person who was entitled to the equity of redemption as tenant for life only, and although the person entitled to the equitable estate in remainder filed his bill within five years after the death of the tenant for life. And it was also held that if the mortgagee entered into possession not in his character of mortgagee only, but as purchaser of the equity of redemption, he was bound to look to the title of his vendor, and if he only acquired a life interest in fact, he was bound to keep down the interest for the

(*f*) *Raffety v King*, 1 Keen, 601

(*g*) *Hyde v Dallaway*, 2 Ha 528

(*h*) *Heskman v Upsall*, 2 Ch D. 617.

(*i*) *S C*, 4 Ch. D 145, C A

(*k*) *Price v Copner*, 1 S & St 347

(*l*) *Booth v Passer*, 1 Ir. Eq R 33

(*m*) *Ashton v Milne*, 6 Sim. 369,
Cholmondeley v Clinton, 4 Bl. 1.

(*n*) 1 S & St. 471. And see *Foster v. Blake*, 4 Bl 140

benefit of the remaindermen, and the time did not run against the remaindermen during the continuance of the life estate (o), although the estate of the tenant for life had been enlarged by a tortious conveyance (p).

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On a similar ground, relief has been given to a remainderman, on coming into possession, against a sale under a decree of the Court, fraudulently obtained by collusion between the mortgagees, the tenant for life, and the purchaser, by permitting the remainderman to redeem after a lapse of thirty-five years (q). So where during the possession there was a tenancy by the curtesy (r).

There is in the Acts now in force no express saving of disabilities of the mortgagor or his heirs in any distinct clause; they were saved under the old Statute of Limitations (s), but it has been held that sect 16 of the Act of Will IV. as to disabilities does not apply to a mortgagor redeeming, inasmuch as an action for redemption is not an action to recover land for the purposes of the Statutes of Limitation (t).

Disabilities

There may, however, be circumstances which might be held to take the case out of the statute: for instance, if there was fraud or oppression in the transaction (u), or if the mortgagee used unfair means to clog the redemption of the mortgage (x), or the like.

Fraud, &c

The provisions of sect. 26 of the statute 3 & 4 Will IV. c. 27, save the rights of persons to bring suits for the recovery of land of which they have been deprived by concealed fraud (y); but, for the reason stated above, these provisions do not appear to apply to cases of redemption.

Concealed fraud

Possession taken under a mistake, though by consent of the real owner, is not the less effectual in barring his rights if the person in possession has no duty to perform (z).

Mistake

(o) *Raffety v. King*, 1 Keen, 601, *Mills v. Borthwick*, 11 Jur N S 558, *Burrowes v. Gore*, 6 H. L. C 907, *Hawkins v. Gardner*, 2 Sm & G 441, (p) *Lewis v. Rees*, 3 K & J 132, *Mills v. Capel*, L R 20 Eq 692, (q) *Earl of Bandon v. Becher*, 3 Cl & F 479 And see *Gore v. Stackpool*, 1 Dow, 18, *Bennett v. Colley*, 2 My & K. 225, *Fausset v. Carpenter*, 2 Dow & C 232, *Thornhill v. Glover*, 3 Dr & War 195, *Bowen v. Evans*, 2 H L C 257.

(r) *Anon*, 2 Atk 333, (s) *Proctor v. Oates*, 2 Atk 140, *Anon*, 3 Atk 313, *Jenner v. Tracy*, 3 P Wms 287, n, *Bonny v. Ridgway*, cited 17 Ves. 99, (t) *Per Jessel, M R*, in *Kinsman v. Rouse*, 17 Ch D 104, at p 107 See *Forster v. Patterson*, 17 Ch. D 132. (u) *Spurgeon v. Collier*, 1 Ed 55, (x) *Ord v. Smith*, Sel Ca in Ch 9. (y) *Set out post*, p 1072, (z) *Cholmondeley v. Clinton*, 4 Bl. 1

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Sect 34 of Act of Will IV as to extinguishment does not apply.

But mortgagee obtains a good title

Sect 34 of the Act of Will IV., providing that at the end of the period of limitation the right of the party out of possession is to be extinguished, is expressly limited to actions for recovery of lands, rents and advowsons, and, consequently, does not appear to apply to redemptions

It has, however, been held that after the period has elapsed the mortgagee, or the trustee (if the security is by way of trust for sale) may sell under his power or trust, and make a good title, and convey to a purchaser, and the mortgagor will have no right to the surplus proceeds of the sale (*a*); and if the mortgagor brings an action to redeem, the mortgagee will be entitled to raise the statutory bar by his pleadings (*b*)

Where the trustee in bankruptcy is barred by the Statute of Limitations, the bankrupt, after annulment of the bankruptcy, is barred also (*c*).

Acknowledgment before statute 3 & 4 Will IV c 27

iii.—What Acknowledgment is sufficient to keep alive the Right of Redemption.—Before the statute 3 & 4 Will IV any act of a mortgagee of lands acknowledging the mortgage as subsisting would have saved the mortgagor's right of redemption (*d*) Such an acknowledgment might be proved by any clear and unimpeachable evidence by parol or otherwise (*e*) As neither that statute nor the statute 37 & 38 Vict c 57, affects mortgages of personalty, other than leaseholds, it would seem that the rules as to acknowledgment laid down in the earlier decisions are still applicable to such mortgages, so as to require a brief consideration in this place.

What amounted to such acknowledgment

An acknowledgment, so as to save the equity of redemption, need not have been made in a transaction between the mortgagee and the mortgagor, or their representatives So a conveyance by way of sale, security, or settlement of the lands expressed to be made subject to the mortgage would be a clear acknowledgment, though the mortgagor was not a party to the deed (*f*). So also if the mortgagee devised the property as his "mortgaged estate," or subject to the mortgage (*g*), or if he alluded to it as

(*a*) *Re Alston, Johnson v. Mounsey*, 11 Ch D. 284, C A, *Chapman v Corpe*, 41 L. T. 22.

(*b*) *Ante*, p 731

(*c*) *Markwick v Hardingham*, 15 Ch D 339, C A

(*d*) *Hoile v Healey*, 1 V & B 536, *Price v Copner*, 1 S. & St 347, *Cutler*

v. Cramer, 1 L J Ch 108

(*e*) *Whiting v White*, 2 Cox, 295, G Coop 1, *Reeks v Postlethwaite*, G Coop 161

(*f*) *Smart v Hunt*, 4 Ves 478, n, *Perry v Marston*, 2 Bro C. C 399, *Hansard v Hardy*, 18 Ves. 455.

(*g*) *Anon*, 3 Atk 313

subsisting by recital or otherwise in a deed or will (*h*), there would be sufficient evidence of acknowledgment. It is said, however, that a conveyance of the property subject to the subsisting equity of redemption, "if any," would not be sufficient (*i*)

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The equity of redemption would be saved by an account kept with the mortgagor or his representatives (*k*), or even by a private account kept by a mortgagee of the profits of the estate in which he treated the property as redeemable (*l*). But an account or other acknowledgment given by an agent of the mortgagee without his authority would not keep alive the right (*m*).

Accounts of mortgagee

The case was taken out of the statute if the mortgagee submitted to be redeemed (*n*); or if the mortgagor, or his heir, remained in possession of any part of the estate (*o*); or if the time was otherwise well accounted for, as in a case in which it appeared that there had been a promise that the mortgagor should be at liberty to redeem after twenty-seven years, where redemption was allowed after forty-one years, being only fourteen years from the time allowed (*p*); and as in another case (*q*), in which redemption was allowed fifty years after the mortgage, and after forty-seven years' possession by the mortgagee, and five ejectments at law to try the title, and refusal by four several answers to account, the time being accounted for by the legal proceedings. If, however, a mortgagor filed his bill to redeem, and obtained a decree to account, he must have prosecuted his suit, or in twenty years he would be barred (*r*).

Parol evidence was admissible to affect the mortgagee, but it must have been clear and unimpeachable (*s*). Even if the equity of redemption was actually released by the mortgagor to the mortgagee, evidence would be admitted that the release was made upon a secret trust for his benefit (*t*), or that it was not intended to be an absolute sale (*u*).

Parol evidence admissible

(*h*) *Ord v Smith*, Sel. Ca. Ch. 9, *Price v Copner*, 1 S. & St. 347.

(*i*) *Hardy v Reeves*, 4 Ves. 466, 480.

(*k*) *Procter v Cowper*, 2 Vern. 377, *Anon.*, 2 Atk. 333.

(*l*) *Fairfax v Montague*, cited 2 Ves. Jun. 84, *Campbell v Beckford*, cited 4 Ves. 474, *Lake v Thomas*, 3 Ves. 17—22.

(*m*) *Barron v Martin*, 6 Coop. 189.

(*n*) *Procter v Oates*, 2 Atk. 140.

(*o*) *Rakestraw v Brewen*, 2 P. Wms. 511, *Burke v Lynch*, 2 Ba. & Be. 426. And see 2 Ba. & Be. 573.

(*p*) *White v Pigeon*, Tothill, tit. 102, p. 135.

(*q*) *Palmer v. Jackson*, 5 Bro. P. C. 281.

(*r*) *St. John v. Turner*, 2 Vern. 413.

(*s*) *Whiting v White*, 2 Cox. 295.

(*t*) *Monley v Elways*, 1 Ch. Ca. 107.

(*u*) *Vernon v. Bethell*, 2 Ed. 110.

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Redemption was allowed after forty years' possession, on evidence of a contract entered into within seven years preceding the filing of the bill, by the heir of the mortgagee, for purchase of the equity of redemption (*u*), and where bills of foreclosure had been filed (*v*).

Acknowledgment under statute 3 & 4 Will IV c 27, s 28.

In order to take a case out of the operation of the statutes now in force, so as to preserve the right of redemption, notwithstanding possession by the mortgagee, sect. 28 of the Act of Will IV. requires that an acknowledgment must in the meantime have been given of the title of the mortgagor, or of his right to redemption to the mortgagor, or to some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or some person claiming through him.

Retrospective effect of sect 28

Acknowledgment after expiration of statutory period.

This section has been held to be retrospective in its operation as regards acknowledgments (*w*).

It was held under the statute of Jac. I that an acknowledgment made after twenty years' possession by the mortgagee would revive the mortgage and restore the equity of redemption (*y*). And in one case, since the statute of Will IV, the Lord Justices Knight-Bruce and Turner expressed their opinion that the rule still clearly applied, and they decided accordingly (*z*). The correctness of this decision was doubted in a recent case (*a*), and seems open to question. According to the express language of sect 28, a case does not come within the exception unless the acknowledgment is given "in the meantime," which would seem to be capable of no other construction than as meaning within twelve years after the mortgagee entered into possession. This question is not affected by the decisions on extinguishment of title under sect. 34 (*b*), inasmuch as that section applies only to entries and actions for recovery of land, and it has been seen that an action for redemption is not an action to recover land for the purposes of the Statute of Limitations (*c*).

(*u*) *Conway v. Shrumpton*, 5 Bro P C. 187

(*v*) *Palmer v. Jackson*, 5 Bro P C 281

(*w*) *Batchelor v Middleton*, 6 Ha. 75

(*y*) *Fendleton v Booth*, 1 De G. F & J. 81

(*z*) *Stansfield v. Hobson*, 3 De G. M. & G 620.

(*a*) *Markwick v. Hardingham*, 15 Ch. D 339, at p 346, C A. See *Brassington v Llewellyn*, 27 L J. Ex 297. See also the cases cited *post*, p 982, on the similar phrase in sect 40 of 3 & 4 Will IV c 27.

(*b*) See *post*, p 1073

(*c*) See *ante*, p 747.

The acknowledgment must be made to the mortgagor or those claiming under him, or the agent of one of such persons.

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To whom the acknowledgment must be given

An acknowledgment of the mortgagor's title by a recital in an assignment of the mortgage, but to which the mortgagor is not a party, is not sufficient to stop the statute from running (*d*). But it seems to be otherwise if the mortgagor is a party (*e*). An acknowledgment made to the grandfather, tenant by the curtesy, of the right of his infant granddaughter, entitled as heir to the inheritance, has, however, been held to be sufficient, as being made to her agent, though the acknowledgment would otherwise seem to have been sufficient, as being made to the particular tenant of the equity of redemption (*f*).

An acknowledgment to a bankrupt is not sufficient, as the bankrupt is not the agent of his trustees (*g*).

A letter written by a mortgagee to his own solicitor would not amount to an acknowledgment (*h*).

Formerly, as has been seen (*k*), a parol acknowledgment would have been sufficient to keep alive the equity of redemption, but now the acknowledgment must be in writing signed by the mortgagee or the person claiming under him.

Acknowledgment must be in writing

Whatever expressions made by parol would have amounted before the statute to an acknowledgment, will still be sufficient if in writing, and if the other requirements of the statute are duly complied with (*l*). Any expression, therefore, referring to the estate as mortgaged, or to the person entitled to the equity of redemption, and expressing a readiness to settle the account, or referring to a proposed arrangement for accounting or for paying off the mortgage debt, will be a sufficient acknowledgment (*m*).

What acknowledgment is sufficient

No particular form is necessary, nor need the amount be stated (*n*).

The acknowledgment may be by affidavit in an action (*o*); in a schedule (*o*); or by an answer to interrogatories (*o*); or by a letter or other writing.

(*d*) *Lucas v. Dennison*, 13 Sim 584

(*e*) See *Batchelor v. Middleton*, 6 Ha.

75

(*f*) *Trulock v. Robey*, 12 Sim 402

(*g*) *Markwick v. Hardingham*, 15 Ch D 339, 352, C A.

(*h*) *Stansfield v. Hobson*, 3 De G. M. & G 620

(*k*) *Ante*, p 748

(*l*) *Stansfield v. Hobson*, 3 De G. M. & G 620

(*m*) Fish Mtg 694.

(*n*) *Trulock v. Robey*, 12 Sim 402, *Lord St John v. Boughton*, 9 Sim 219, *France v. Sympton*, Kay, 678

(*o*) *Blair v. Nugent*, 3 J & L 658, see Sug R P St 130.

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Acknowledg-
ment must
be explicit

The acknowledgment must, however, amount to a clear and unequivocal admission that the mortgagee holds under a mortgage title (*p*) A letter denying the right of redemption claimed, but stating that, even if the mortgagor were entitled to redeem, he would derive no benefit from the account, was held to be insufficient (*q*).

Accounts.

The fact of the mortgagee treating himself as mortgagee and accounting, but without any signature of the accounts according to the Act, is not sufficient (*r*); and it has been said the commencement of an action of foreclosure would not be sufficient (*s*); but under the old practice the mere filing of a bill for foreclosure was sufficient, though service might not have been effected till long afterwards (*t*) A mere demand without process will not suffice (*u*).

Acknowledg-
ment by
agent of
mortgagee

Under sect. 28 no force is given to an acknowledgment by an agent of the mortgagee, which seems to stand on the same footing as under another statute (*x*), whereby an acknowledgment of a debt must be made in writing signed by the party chargeable therewith Under that statute it has been held that the signature of an agent of the debtor was not sufficient (*y*); but now, in cases falling within that statute, an acknowledgment by an agent is rendered sufficient by sect. 13 of the stat 19 & 20 Vict. c 97

Joint
mortgagees

Where there is a mortgage to several jointly, there must be a joint acknowledgment (*z*)

(*p*) *Whiting v White*, G Coop 1,
Reeks v Postlethwaite, G Coop 161,
Barron v Martin, G Coop 189

(*q*) *Thompson v Bowyer*, 9 Jur N S
863

(*r*) *Baker v. Wetton*, 14 Sim 426.

(*s*) *Fish Mtg* 695

(*t*) *Coppin v Gray*, 1 Y & C C C
205, *Purcell v Blennerhassett*, 3 J & L
24, *Forster v Thompson*, 4 Dr & War

303, *Hele v Lord Bealey*, 20 Beav
127

(*u*) *Hodle v Healey*, 1 V. & B 536

(*x*) 9 Geo IV c 14, s 1

(*y*) *Hyde v Johnson*, 2 Bing N C
776, *Clark v Alexander*, 8 Sc N R
165

(*z*) *Richardson v Younge*, L R 6
Ch A 478.

CHAPTER XL

OUT OF WHAT FUND A MORTGAGE DEBT IS PAYABLE.

SECTION I.

PRIMARY LIABILITY OF PERSONALTY UNDER FORMER LAW.

i.—General Rule as to Mortgages of Realty before Locke King's Act.—The law relating to the primary liability of the personal estate of a deceased mortgagor to payment of a mortgage debt in exoneration of real estate comprised in the mortgage has been altered by the statute commonly known as Locke King's Act (*a*), which statute, however, does not apply to the estates of persons who died before the 1st of January, 1855, nor so as to affect the rights of any person claiming under or by virtue of any will, deed, or document made before that date. Moreover, neither that Act nor either of the amending Acts (*b*) have any application to mortgages of personality other than leaseholds.

Alteration
of the law by
Locke King's
Act, &c

The rule of law which prevailed before Locke King's Act was that, as between the heir or devisee of a deceased mortgagor of the one part, and his personal representatives of the other part, the personal estate was primarily liable to the payment of a debt secured by mortgage of real estate, and must have indemnified the real estate against the debt, so as to exonerate the mortgaged lands. This rule was of general application, and prevailed, subject to exceptions to be hereafter noticed, whether the lands in mortgage devolved on the heir-at-law as *hæres natus* (*c*), or on a general devisee as *hæres factus* (*d*), or on a particular devisee (*e*); in either case the

Former rule
making per-
sonalty the
primary fund

(*a*) 17 & 18 Vict c 113, *post*, p 767
(*b*) 30 & 31 Vict c 69, 40 & 41
Vict c 34 See *infra*, p 769

(*c*) *Cope v Cope*, 2 Salk 449, *Howell v. Price*, 1 P Wms 292, *Chester v Powell*, 7 Jur 389

(*d*) *Lutkins v Leigh*, Forrester, Cas. t. Talb 54, *Galton v Hancock*, 2 Atk. 436

(*e*) *Pockley v Pockley*, 1 Vern 36, *Johnson v Milksope*, 2 Vern 112. And see *Galton v. Hancock*, *sup*

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personal estate, in the absence of evidence of intention to the contrary, became the primary fund, and exonerated the real estate, descended or devised, from the debt. And this rule held good even in the case of a Welsh mortgage, where the mortgagee cannot foreclose, nor bring an action for the sum lent (*f*); and whether, in the case of an ordinary mortgage, there was a covenant or bond accompanying the mortgage or not (*g*), and applied equally to the case of a devise by a mortgagee who had created a sub-mortgage (*h*)

Contrary intention might be expressed or implied

ii.—Exemption of Personalty by Expressions of Contrary Intention.—The operation of the rule above referred to might, however, always have been excluded by contrary intention to be gathered expressly (*i*) or by plain implication (*h*) from the language of the mortgagor's will that the mortgage debt should be borne by the mortgaged property, or that the debts generally should be paid out of a specific fund in exoneration of the general personal assets; for in construing a direction for payment of debts the expression "debts" was, until the passing of the statute 40 & 41 Vict. c. 34, deemed to include mortgage debts (*l*).

Intention to exempt personal estate necessary.

But it was not sufficient for a testator to show an intention to charge his real estate with the payment of his debts, whether by a trust for sale limiting a term, or simply charging the estate; he must show an intention to exempt his personal estate (*m*); though the grounds of this rule would appear to be somewhat weakened since the statute 3 & 4 Will IV. c. 104, rendering realty assets for the payment of debts.

Parol evi-

The question was decided only by an examination of the

(*f*) *Houel v Price*, 1 P Wms 292
And see *Longuet v Scaven*, 1 Ves Sen 402, 405, *Byluer v Astley*, 1 Ph 422

(*g*) *Yates v Aston*, 4 Q. B. 182, *Allenby v. Dalton*, 5 L J K B 312, *King v King*, 3 P Wms 358, *Cope v Cope*, 2 Salk 449

(*h*) See *Lockhart v Hardy*, 9 Beav 379

(*i*) *Morrow v Bush*, 1 Cox, 185, *Young v Young*, 26 Beav 522

(*k*) *Ion v Ashton*, 28 Beav. 379, *Forrest v. Prescott*, L R 10 Eq 545

(*l*) See *post*, p 769

(*m*) *Dolman v Smith*, Prec Ch 456, *Frenah v Chichester*, 2 Vern 568, *Stapleton v Colville*, Forrester, Cas. t. Talb.

202, *Haslewood v Pope*, 3 P Wms 325, *Feneyes v Robertson*, Bumb 302, *Walker v Jackson*, 2 Atk 625, *Bridgman v Dove*, 3 Atk 202, *Lord Inchgunn v French*, Amb 33, *Samuell v Wake*, 1 Bro C C 144, *Aldridge v Lord Wallscourt*, 1 Ba & Be 312, *Watson v Brichwood*, 9 Ves 447, 453, *Tait v. Northwick*, 4 Ves 816, *Towen v Lord Rous*, 18 Ves 132, *Bootle v. Blundell*, 1 Mer 193, *Rhodes v Rudge*, 1 Sim 79, *Walker v Handwick*, 1 My & K 396, *Colles v Robins*, 1 De G & S 131, *Quenell v Turner*, 13 Beav 240, *Davies v Ashford*, 15 Sim. 42.

whole will taken together, and extrinsic evidence was not received to show the testator's intention (*n*)

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dence not
admissible
Express
exoneration of
personalty

Where the personalty was expressly discharged from the payment of a particular debt, or of debts generally, the exemption is clear; the effect was to throw the liability on all other property not expressly exempted (*o*)

Where a mortgaged estate was devised expressly charged with "the payment of any sum or sums of money on the security of the said estate," it was held that the personalty was exonerated, as otherwise, in favour of a creditor, the charge would be superfluous and meaningless (*p*)

Exoneration
by express
charge of
mortgage
debts

So, also, the personalty was held to be exempted where there was an express trust to pay mortgage debts and interest out of the rents and the produce of the sale of the particular estate mortgaged (*q*).

Express trust
to pay debts

Where a testator bequeathed legacies and annuities, and charged them on real estate which he devised subject thereto, the personalty was exonerated (*r*); but a devise of the mortgaged estate, "subject to the mortgages affecting the same," did not exempt the personalty: it was held to be mere description (*s*).

The personalty was also exonerated where it was bequeathed in trust as the testator should appoint, and in default to the trustee and executors (*t*); where there was a particular direction that funeral expenses should be paid out of the real estate (*u*); where the residuary legatee had the first life interest in the real estate (*x*); where the trustees and executors were the same persons, but the two characters were carefully kept separate (*x*); where the gift of the general personal estate was specific (*y*).

Other cases of
exoneration

(*n*) *Boote v Blundell*, 1 Mer. 193, 216 See *Lord Inchiquin v French*, Amb 33, *Andrews v Emmot*, 2 Bro C C 303

(*o*) *Young v Young*, 26 Beav 522, *Gilbertson v Gilbertson*, 34 Beav 357

(*p*) *Evans v Cockeram*, 1 Coll 428 And see *Symons v James*, 2 Y & C C C 301, *Dawes v Scott*, 5 Russ 42, *Clutterbuck v Clutterbuck*, 1 My & K 15, *Hatch v Shelton*, 20 Beav 453, *Lady Langdale v Briggs*, 8 De G M. & G 391, *Birds v Askey*, 24 Beav 618, 620 See also *Ibbetson v Ibbetson*, 12 Sim 206

(*q*) *Symons v James*, 2 Y & C C C 301

(*r*) *Ion v Ashton*, 28 Beav 379,

Sinnett v Herbert, L R 12 Eq 206, reversed on other points, L R 7 Ch A 232

(*s*) *Townshend v Mostyn*, 26 Beav 72.

(*t*) *Burton v Knowlton*, 3 Ves 107 But see *Aldridge v Lord Wallscourt*, 1 Ba & Be 312

(*u*) *Boote v Blundell*, 1 Mer 193, *Gilbertson v Gilbertson*, 34 Beav 357, *Metcalfe v Hutchinson*, 1 Ch D. 591

(*x*) *Boote v Blundell*, *sup*

(*y*) *Blount v Hopkins*, 7 Sim 43 And see *Driver v Ferrand*, 1 R & My 681 But see *Collis v Robins*, 1 De G & S 131, and *Sargent v Roberts*, 17 L J Ch 117, *Lance v Aghonby*, 27 Beav 65 But see *Greene v Greene*, 4 Madd 148, and *Mitchell v Mitchell*, 5 Madd 69

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Direction to pay debt out of particular part of realty.

So a gift of a personal estate by an enumeration of specific articles (z), or so as to be a specific bequest (a)

An express direction that a particular debt should be paid out of a particular portion of the real estate exonerated the personalty. Such a direction affords a very different inference from a devise to sell for payment of all debts, which evinced nothing more than an intention that all the debts should be paid, and the real estate, if necessary, applied for the purpose, and did not exonerate the personal estate (b)

Cases where the personalty was held not to be exonerated

Where all the personalty was bequeathed to the executor, who was also one of the devisees of the real estate (c); where the legatee of the personalty was tenant for life of the real estate, and also executor (d); where the personalty was bequeathed to sisters, and the trustees of the real estates were appointed executors (e); where the legatee of the personalty was appointed executor together with the trustees of the real estate (f)—there was no exemption; and no trace of intention to exonerate was held to exist where the personalty is undisposed of (g)

Direct bequest to executors

The personal estate was not exempted from debts by a direct bequest to the executors (h)

Same persons trustees and executors.

The circumstance of the same persons being appointed trustees and executors has had considerable weight in inducing judges to draw an inference that the personal estate is not to be exempted (i); and Lord Alvanley has remarked (k) that the circumstance of the trustees not being the executors affords a strong inference as to the real intention, and is always favourable to the exemption of the personal estate

Bequest of residue.

A bequest of a residue has always been considered unfavourable to exemption (l). But a distinction has been drawn in

(z) *Draver v. Ferrand*, 1 R. & M. 81, and *Sargent v. Roberts*, 17 L. J. Ch. 117

(a) *Powell v. Riley*, L. R. 12 Eq. 175.

(b) *Hancock v. Abbey*, 11 Ves. 179. And see *Walker v. Pink*, cited 1 Cox, 5

(c) *Brummel v. Prothero*, 3 Ves. 111, *Watson v. Brickwood*, 9 Ves. 447

(d) *Watson v. Brickwood*, *sup*. And see *Tower v. Lord Rous*, 18 Ves. 132

(e) *Tait v. Lord Northwick*, 4 Ves. 816.

(f) *Hartley v. Hurle*, 5 Ves. 540. And see *Williams v. Chitty*, 3 Ves. 545, *Shalloross v. Fenden*, 3 Ves. 738,

King v. Denison, 1 V. & B. 274, and *Keeling v. Brown*, 5 Ves. 359

(g) *Lomax v. Lomax*, 12 Beav. 285

(h) *Duke of Ancaster v. Mayer*, 1 Bro. C. C. 462, *Stephenson v. Heathcote*, cited 1 Bro. C. C. 458, *Bootle v. Blundell*, 1 Mer. 223, overruling *Walker v. Jackson*, 2 Atk. 624

(i) *Dolman v. Smith*, Prec. Ch. 456. And see *Stephenson v. Heathcote*, *sup*, *Ancaster v. Mayer*, *sup*, *Bootle v. Blundell*, *sup*, *Rhodes v. Rudge*, 1 Sim. 79. But see *Draver v. Ferrand*, 1 R. & M. 681, where the contrary inference was drawn under the circumstances of the case

(k) In *Burton v. Knowlton*, 3 Ves. 108

(l) *Lord Inchiquin v. French*, Amb.

cases in which the residue has been immediately preceded by an enumeration of specific articles, not likely to be intended by the testator to be sold (*m*); and also in cases in which the residue has been considered as not meaning the residue after satisfaction of debts, &c., but the residue of the personal estate before specifically bequeathed (*n*); and in all cases in which, from circumstances, it can be considered as specific, it will be exempted.

It was well settled that a devise of lands "subject to" debts generally, or to a specific mortgage or charge on the land was to be considered to be merely descriptive of the state of the property, and not an indication of intention to throw the burden of the debts or charge on the lands in exoneration of the assets (*o*)

Devise subject to debts

So, where a testator having two estates comprised in one mortgage devised an estate to A, subject to the payment of part of the debt, and the other estate to B, subject to the payment of the residue, it was held that this only fixed the proportions in which the estates were to bear the charge as between themselves, and did not imply an intention to exonerate the personal estate (*p*)

In one case (*q*) a devise of an estate to a person, "he paying the mortgage thereon," was held to impose the burden on the estate in exoneration of the personalty, but the decision seems questionable, as the contrary was decided as to similar words in two earlier cases (*r*)

The circumstance of the possession of the real and personal estate accruing to one and the same person, *i e.*, of the real estate charged with debts being limited in strict settlement, and

Real and personal estate in same settlement

33, *Phillips v Phillips*, 2 Bro C C 273, *Stephenson v Heathcote*, cited 1 Bro C C 453 And see *Walker v Hawdwick*, 1 My & K 396

(*m*) *Adams v Meyrick*, 1 Eq Ca Abr 271, *Bradnox v Gratrix*, cited 3 P Wms 325, *Blount v Haphins*, 7 Sim 43, *Greene v Greene*, 4 Madd 148, *Mitchell v Mitchell*, 5 Madd 69

(*n*) *Att-Gen v. Barkham*, cited Forrester, Cas t Talb 206, *Adams v Meyrick*, *sup*, *Anderton v Cook*, cited 1 Bro C C 456, *Warse v Whitfield*, 2 Eq Ca Abr 374, *Walker v Jackson*, 2 Atk 624, *Stapleton v Colville*, Forrester, Cas t Talb 202, *Clutterbuck v Clutterbuck*, 1 My & K 15 And see *Choat v Yeats*, 1 J & W 102, *Browne v Groombridge*, 4 Madd 495

(*o*) *Serie v. St Eloy*, 2 P Wms 386,

Duke of Ancaster v Mayer, 1 Bro C C 454, *Astley v Earl of Tankerville*, 3 Bro C C 545, *Bannewell v Lord Cawdor*, 3 Madd 453, *Phillips v Parker*, Taml 136, *Brickham v Crutwell*, 3 My & Cr 763, *Townshend v Mostyn*, 26 Bear 72 See also Lord Eldon's judgments in *Milnes v Slater*, 8 Ves 306, *Bootle v Blundell*, 1 Mer 227, and *Noel v Noel*, 12 Price, 213

(*p*) *Goodwin v. Lee*, 1 K. & J 377 See also *Wythe v Henmker*, 2 My & K 635

(*q*) *Per Lord Langdale in Lockhart v Hardy*, 9 Bear. 379

(*r*) *Bridgeman v Dove*, 3 Atk 201, *Mead v Hyde*, 2 Vern 120 Neither of these cases was cited in *Lockhart v. Hardy*, *sup*,

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the personal estate being given to the person who was entitled to the possession of the real estate, so that the personal estate was made to accrue to the real estate, was differently considered by different judges. The balance of authority was in favour of the view that, as a testator could not intend that his settled family estate should be burdened with debts, and his personal estate be given away discharged from debts to be squandered and dissipated, he must have meant that his personal estate should not be exempt (s)

When funeral expenses are not charged.

It seems that the omission to charge funeral expenses (t) on the real estate was regarded as a circumstance of some weight to show that the personal estate was not to be exempt, because funeral expenses are the first charge on that fund (u), and also because it showed that the testator intended the personal estate to be charged beyond the particular legacies or charges mentioned in the will, and being once broken in upon, the argument of its being specific was destroyed (x)

Suspension of liability of personality

The primary liability of the personal estate might have been suspended for a time; as where a mortgagor directed by his will that the interest of a mortgage debt should form part of annuities, which he devised, out of the mortgaged estate, to the person having a life interest in the mortgage debt (y)

It may be added that a particular part of the personal estate might, in like manner, have been charged with debts and legacies, in exoneration of the residue (z).

Revivor of liability

Where the personal estate was bequeathed exonerated from debts, and the gift lapsed, the primary liability of the personal estate returned (a), though otherwise where a general intention, and not merely one in favour of a particular individual (b), was expressed

The evidence of intention to exonerate the personal estate was in all cases to be gathered from an examination of the whole will taken together, but not from extrinsic circumstances (c).

(s) *Dolman v Smith*, Prec Ch 456, *Haslewood v Pope*, 3 P Wms 323, *Harwood v Child*, cited Forrester, Cas t Talb 204

(t) See, as to the effect of such a charge under the present law, *post*, p. 772

(u) *Burton v Knowlton*, 3 Ves 107

(x) See *Brydges v Phillips*, 6 Ves 567.

(y) *Sargent v. Roberts*, 17 L. J. Ch 117.

(z) *Brown v Groombridge*, 4 Madd 495, *Choat v Yeats*, 1 J & W 102

(a) *Waring v Ward*, 5 Ves 670, *Noel v Lord Henley*, M'C'l & Y 302

(b) *Milnes v Slater*, 8 Ves 295

(c) *Bootle v Blundell*, 1 Mer 193, at p 216, *Gittins v Steele*, 1 Swanst 24 And see *Lord Inchiquin v French*, Amb 33; *Andrews v Emmot*, 2 Bro. C. C. 303.

iii.—**Exceptions to the Rule.**—To the general rule, as to the primary liability of personalty under the former law, there were certain important exceptions. In order to apply the rule that personalty was the primary fund applicable for payment of a mortgage debt, the incumbrance must have been created or adopted by the deceased owner himself. The ground on which the claim of the mortgaged estate to be exonerated at the expense of the personalty rested, was that the creation of a mortgage by a testator or immediate ancestor benefited the personalty, which was therefore bound to bear the burden.

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Ground of the general rule

If, then, the mortgage debt was not the debt of the testator or ancestor himself, but the estate had come to him by devise or descent, incumbered with a mortgage created by a prior owner, there was no ground for the application of the general rule; but the mortgaged estate in the hands of such testator or ancestor was, unless he had done some act to make the debt his own, primarily liable to discharge the debt in exoneration of the personalty.

Exception only applies where debt is of ancestor or testator or himself

So, in *Scott v Beecher* (d), where the devisee was also the sole legatee, and the personal estate of the mortgagor, after payment of debts, &c was sufficient to have discharged the mortgage, and yet on a bill filed by the heir-at-law of the devisee against the administrator of the devisee, who was also administrator *de bonis non* of the mortgagor, to be indemnified out of the personal assets of the latter, his claim was refused. Again, where a mortgagor devised his real and personal estate to his wife, who died intestate without paying off the mortgage, it was held that her heir took the mortgage premises *cum onere* of the mortgage; but in that case, the proceeds of certain policies of insurance, which were a collateral security for the mortgage debt, were held to have been properly applied in payment of the debt (e).

Heir or devisee otherwise takes *cum onere*

Where, however, the mortgage debt was not originally the debt of the deceased owner of the mortgaged property, yet he might, in his lifetime, adopt the mortgage debt and make it his own by some act affording sufficient evidence of intention so to do, in which case his personal estate, as between his real and personal representatives, became primarily liable to discharge the debt (f).

Adoption of debt by heir or devisee

(d) 5 Madd 96. See also *Earl of Ilchester v Earl of Carnarvon*, 1 Beav 209, *Hickling v Boyer*, 3 Mac. & G 635, 644, *Earl of Clarendon v. Barham*, 1 Y. & C C 688, *Hepworth v Hill*, 30 Beav 476, 484.

(e) *Swanson v Swanson*, 6 De G M. & G. 648.

(f) See *Barham v Earl of Thanet*, 3 My. & K. 607, and other cases cited, *inf.*

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Evidence of
intention to
adopt debt.

In matters of this sort, the question is confined to evidence of intention; and therefore as, on transfer or assignment of the mortgage, the concurrence of the heir or devisee, or of the husband of such party, in the deed, and his personal covenant for payment of the money, is only by way of additional security to the mortgagee, the burden of the debt was not, as between the real and personal representatives, altered (*g*). And even where a party entitled to the estate under the limitations of a settlement became also entitled to a charge on the estate, which charge he assigned as a security for a sum borrowed by him, the land remained the fund for payment (*h*). The same principle applied if other estates were added to the security, on a further sum being lent (*i*), or if there were a covenant on his part for increasing the rate of interest (*k*); and it seems that if the sums borrowed by the heir or devisee, and added to the original mortgage, were comparatively small, the Court would not have considered that he had different intentions as to the different sums, but would have charged the real estate with the whole (*l*). The latter doctrine must, however, be received with much caution.

Where, since the execution of a mortgage of lands, the equity of redemption had become vested in several persons, and on a transfer of the mortgage the deed of transfer contained a covenant by the mortgagors for personal payment of their respective proportions of the mortgage debt, and also a new proviso for redemption, providing for re-conveyance to each person of his own share, it was held that the personal estates of such persons were not rendered primarily liable for the payment of the mortgage debt notwithstanding the covenant and proviso, since these only expressed what the law would imply (*m*).

Lord Northington (*n*) is said to have given an opinion that if, on a transfer of mortgage, a new equity of redemption is created, the personal estate of the heir would, on his death, have become the primary fund. But this opinion seems to be at variance with several well-considered cases, and must, it is submitted, be con-

(*g*) *Bagot v Oughton*, 1 P. Wms 347, *Evelyn v Evelyn*, 2 P. Wms 659, *Leman v Newnham*, 1 Ves Sen 51. And see *Waring v Ward*, 7 Ves 336.

(*h*) *Noel v Lord Henley*, M. Cl. & Y 302.

(*i*) *Duke of Ancaster v Mayer*, 1 Bro. C. C 454, 464.

(*k*) *Shafto v. Shafto*, 2 P. Wms,

cited 664, n.

(*l*) *Lewis v Nangle*, 2 P. Wms cited 664, n.

(*m*) *Hedges v Hedges*, 5 De G. & S. 389.

(*n*) *Donisthorpe v Porter*, Amb 600, but the exact nature of the transaction in this case does not clearly appear from the report. See also *Lushington v. Sewell*, 1 Sim. 435,

fined to instances in which, from the circumstances attending the case, an evidence of such an intention could have been collected.

The same rule applied to the heir or devisee as to a purchaser (*o*), that a charge by his will of debts generally on his real and personal estate would not of itself have been sufficient to shift the onus from the mortgaged estate (*p*).

Even a direct and original mortgage made by the heir or devisee would not have operated to render his personal estate the primary fund, if the money borrowed was for the purpose of paying off the debts (*q*) or legacies (*r*) of the ancestor or devisor, and the like was the case if the heir or devisee gave his bond (*s*) or note of hand (*t*) for payment of debts or legacies charged on the land

In the case of *Barham v. Earl of Thanet* (*u*), where the heir of the mortgagor and the mortgagee joined in conveying a part of the property to a fresh mortgagee, who advanced a sum to pay off a part of the first mortgage, with an entirely new equity of redemption, and alteration of the rate of interest, it was held that this amounted to an original mortgage, and was not an assignment, and the personal assets of the heir were therefore first applied to payment of the debt

Further advance

Where the heir consolidated his own mortgage and the mortgage of his ancestor into one mortgage and covenanted to pay the whole, he made it his own debt (*x*).

Consolidation

Where a testator devised an estate previously mortgaged by him to his eldest son in tail, and also devised another estate to trustees upon trust to sell, unless the son should satisfy the creditors, and apply the proceeds towards the payment of his debts, and pay the surplus to his son whom he made his residuary legatee, the trustees not having acted, the son entered into possession of all the testator's property; the mortgage was transferred, with a new proviso for redemption and a covenant for payment, with interest at a different rate; the son having

Devise on condition that devisee shall adopt debt.

(*o*) *Duke of Ancaster v. Mayer*, 1 Bro C C 454, *Butler v. Butler*, 5 Ves. 534

(*p*) *Lawson v. Hudson*, 1 Bro C C 58, *Hamilton v. Worley*, 2 Ves Jun 62, *Leman v. Newnham*, 1 Ves Sen 51, *Butler v. Butler*, 5 Ves 534, *Duke of Ancaster v. Mayer*, *sup*

(*q*) *Tankerville v. Fawcett*, 1 Cox, 237, *Perlyns v. Baynton*, 2 P Wms. cited 664, n.

(*r*) *Basset v. Perceval*, 1 Cox, 268; *Mattheson v. Hardwicke*, 2 P Wms 665, n., *Billinghurst v. Walker*, 2 Bro C C. 604, *Hamilton v. Worley*, 2 Ves Jun 62

(*s*) *Billinghurst v. Walker*, *sup*; *Basset v. Perceval*, *sup*

(*t*) *Mattheson v. Hardwicke*, *sup*

(*u*) 3 My & K 607

(*x*) *Townshend v. Mostyn*, 26 Beav. 72. And see *Bagot v. Bagot*, 34 Beav, 134.

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died without paying off the mortgage, it was held that his personal estate was primarily liable, on the ground that he must be presumed to have acted as he did in pursuance of the will, which gave him the option of preventing a sale by taking the debts on himself (y).

Devisee
appropriating
fund set apart
for debts

In another case, in which part of a testator's real estate was by Act of Parliament expressly set aside for the payment of his debts, and the devisee converted the money to his own use, it was held that he had made the debt his own, and that his personal estate was primarily liable for the payment of the debts (z).

Purchase
of equity of
redemption

The same principles which determined what property was primarily liable to a mortgage debt in cases of descent or devise, applied also to the case of a purchaser of property subject to a mortgage. So, if a man purchased an estate subject to an existing mortgage, the debt did not, without more, become his debt, so as to render him personally liable to the mortgagee; the land remained the proper fund for its discharge; and it required clear evidence of intention on the part of the purchaser to make the debt his own, so as to render his personal estate the primary fund for payment (a).

Evidence of
intention to
adopt debt.

In such a case the question may arise what degree of evidence was sufficient to indicate the purchaser's intention to make the debt his own? Generally speaking, a covenant with the vendor for payment of the debt would not have that effect, it being no more than a covenant of indemnity (b). In one case, however, a covenant of that nature was held sufficient for the purpose (c), the purchaser having joined in the covenant to the mortgagee, and afterwards borrowed a further sum, and made a fresh mortgage for the whole debt.

Fresh contract
between pur-
chaser and
mortgagee

Where there was a fresh agreement altogether for payment of the original debt, between the purchaser and the mortgagee *de novo* (d), it was decided that the personal estate of the purchaser was the primary fund. In another case (e), where an estate subject to a mortgage was sold out of Chancery, and the pur-

(y) *Bruce v Morris*, 1 Bro C C 454

(z) *Effingham v Napier*, 5 Bro P C 22

(a) See *per Arden, M. R.*, in *Woods v Huntingford*, 3 Ves 128. See also *Barry v Harding*, 1 J. & L. 475.

(b) *Forrester v Leigh*, Amb 171, *Waring v Ward*, 7 Ves 332, at p 337, *Bridgman v Davo*, 40 W R 253

(c) *Woods v Huntingford*, *sup*. See *Butler v Butler*, 5 Ves 534

(d) *Earl of Oxford v Lady Rodney*, 14 Ves 417

(e) *Waring v. Ward*, 7 Ves. 332.

chaser borrowed a larger sum, out of which the mortgage debt was paid off and a new mortgage created, the whole debt was directed to be paid out of the personal estate of the purchaser, on the ground that the transaction was a personal contract between the purchaser and the mortgagee

It is suggested that these cases do not bear out the doctrine, that if the purchaser by any communication with the mortgagee took the debt upon himself so as to give the mortgagee a right to sue him for the mortgage debt at law, he would be considered to have made the debt his own, and that as between his real and personal representative, his real estate would be only the auxiliary fund for payment. All the three cases of *Woods v. Huntingford*, *Waring v. Ward*, and *Lord Oxford v. Lady Rodney* (*f*), had strong circumstances evidencing the purchaser's intention to consider the debt his own, but it is submitted that no reported case goes so far as to decide that a mere covenant by a purchaser with a mortgagee to pay the debt, without any alteration of the time of payment or any other variation of the original contract, would have operated to render the personal estate of the purchaser the primary fund.

Another class of cases to which the general rule as to the exoneration of the mortgaged estate at the expense of the personalty did not apply, was where the transaction did not strictly impose any personal liability on the owner of the mortgaged property or on any other person, as where a sum of money was agreed to be settled and secured on land, though the mortgage deed contained a covenant for payment; in such cases the personalty was not benefited by the mortgage, and accordingly the mortgaged property must have borne the burden.

Mere charge
not imposing
personal
liability

Thus, where a father agreed, on the marriage of his daughter, to secure a portion for her, and accordingly gave to her trustees a mortgage of part of his estates, and by the mortgage deed covenanted to pay the money; and he afterwards died, having by his will directed payment of his debts first out of his residuary personal estate, then out of his money in the funds, and, lastly, out of his residuary real estate, it was held that the covenant was a matter of form and merely auxiliary, and that the charge created no personal debt of the settlor so as to entitle the mortgaged estate to be exonerated out of the settlor's personalty (*g*).

Agreement
to settle and
secure money

(*f*) *Supra*
(*g*) *Graves v. Hicks*, 6 Sim. 398
See *Lancy v. Duke of Athol*, 2 Atk.

444, *Lechmere v. Chariton*, 15 Ves.
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Settlement
subject to
mortgages.

Where an estate has been settled by deed, subject to mortgages created by the settlor, or to be created under a power given him by the settlement, the devisees of the reversion in fee would, it seems, not have had the usual right of exoneration out of the personal estate, on account of the difficulty of attributing a divided intention to the settlor as to different parts of the fee, unless such intention were shown, for which a general charge of debts on real and personal estate was not sufficient (*h*)

The rule of exoneration did not apply to a mortgage made under a power, as in that case the property, as between the persons entitled to it and the mortgagor, was looked upon as the debtor, even though the personalty of the donee of the power might have received the benefit of the charge (*i*)

Settlor paying
off charge.

If a person who had secured by mortgage the payment of a sum agreed to be settled by him, paid off the charge, he became himself an incumbrancer to that extent for the benefit of his personal estate (*h*)

Failure of
intermediate
limitations

Where a tenant for life created a charge in exercise of a power, and afterwards, by failure of the intermediate limitations, became entitled to the fee, it seems clear that his personal estate would not have been primarily liable if he had died tenant for life (*l*); but if the ultimate remainder had become vested in possession during his lifetime, the point does not seem free from doubt (*m*).

Case of
surety

It remains to consider how far the above principles were applicable in the case of a surety

In many instances, persons are concurring parties in a mortgage, or assignment of mortgage, in the character of sureties. For instance, if a man having a power to charge an estate with a sum of money, raise it by way of mortgage, and on an assignment of the mortgage the person then entitled to the estate is a party, and gives his personal covenant for payment (*n*), the

(*h*) *Ibbetson v Ibbetson*, 12 Sim 206, *Lady Langdale v Briggs*, 8 De G M & G 391, *Bruce v Morice*, 2 De G & S 389, *Loosemore v Knapman*, Kay, 123

(*i*) *Jenkinson v Harcourt*, Kay, 688, *Scholefield v Lockwood*, 4 De G J & S 28. See *Barham v Earl of Clarendon*, 10 Ha 126

(*k*) *Vandeleur v Vandeleur*, 3 Cl & F 82; *Reddington v Reddington*, 1 Ba & Be. 131, *Exp Dugby*, Jac, 235,

Jameson v Stern, 21 Beav 5

(*l*) *Noel v Noel*, 12 Pri 213, at pp 307, 308, *Lady Langdale v Briggs*, 8 De G M & G 391

(*m*) See *Scott v Beecher*, 5 Madd 96, *Lord Ilchester v Lord Carnarvon*, 1 Beav 209, *Earl of Clarendon v Barham*, 1 Y & C C C 688, 711

(*n*) *Evelyn v Evelyn*, 2 P Wms 664. And see *Lechmere v Chariton*, 15 Ves. 193.

covenant will operate as an auxiliary security only, and the land must bear the onus: or, if a person having an estate in lands concur in a mortgage with some other party having also an estate in the same lands, for the purpose of raising a sum of money for the benefit of the latter, he is merely a surety, and may require to have his estate exonerated out of the assets of the other party; and it is said, if he enter into no covenant, that he will not be personally liable to the mortgagee either by way of specialty or simple contract (*o*).

But if he entered into a covenant with the mortgagee, and the estate of the other party was insufficient to meet the debt, it was a question whether his estate in the land or his personalty was the primary fund

A charge of the debt by the will of the surety upon his own estate would not seem to have altered the nature of the debt. But in a case where A. had mortgaged property by way of collateral security for a debt of two of his sons, which was secured also by a mortgage of property belonging to them, and a bond of indemnity had been given by the latter to the former, and A. afterwards devised the property so mortgaged to one of the two sons, and gave the rest of his real and personal estate to trustees on trust to convert into money and pay debts, and particularly the sums which might become payable out of the property so devised to his son, and after payment of certain legacies, then to divide the residue among his three sons in certain proportions, Vice-Chancellor Knight-Bruce held that the testator had taken the debt on himself, and that it was a gift to his two sons (*p*).

On the principle of suretyship rest the cases in which it has been decided that if in a settlement of real estate a settlor covenant for payment of children's portions or widow's jointure (*q*), or if a person make a voluntary gift by way of charge, and covenant for payment of the money (*r*), the land must be the primary fund for payment.

So, if tenant for life, with power of charging real estate, made a charge with a covenant for payment, his personal estate

(*o*) *Lloyd v Thursby*, 2 Cru Dig 4th ed p 124

(*p*) *Musket v Cliffe*, 2 De G & S 243

(*q*) *Lancry v Duke of Athol*, 2 Atk 444, *Edwards v Freeman*, 2 P. Wms

438, *Coventry v Coventry*, 2 P Wms. 222, *Graves v Hicks*, 6 Sum 398 And see *Lucy v Gardener*, Bunb 137

(*r*) *Wilson v Darlington*, 2 P Wms. 664, n

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was not primarily liable to exonerate the land (s) And this rule was applied to a case where a *feme covert*, having a life estate with power of charging, and with ultimate remainder to herself in fee, charged the estate under her power and covenanted for payment, and then, by the death of her husband and the failure of the intermediate limitations, became absolute owner of the fee, which descended on her heir (t)

Husband
and wife

If a husband and wife concur in mortgaging the estate of the latter for the benefit of the former, the wife is regarded as a surety, and as between her real and personal representatives the principles applicable generally to cases of suretyship apply But in mortgages of this kind a distinct question arises as to the right of the wife during her life and of her heir or devisees after her death to have the mortgaged property indemnified by the husband, who is the principal debtor. This question has been already considered in a previous Chapter (u)

Mortgage of
personalty.

iv.—Exoneration of Personalty specifically mortgaged out of the General Assets —As regards mortgages and pledges of personalty (including leaseholds, prior to the passing of the statute 40 & 41 Vict c 34 (x)), the general rule of law was that the general assets of a deceased mortgagor or pledgor were primarily liable to satisfy the debt in exoneration of the particular property comprised in the mortgage or pledge, which was regarded merely as a collateral security for the debt (y) And in one case it was held that a specific legatee of stock, for the sale of part of which a power of attorney was, after the date of the will, executed by the testator to parties, who honoured his bills, but did not sell the stock till after his death, was in the position of a legatee of mortgaged property, and, therefore, entitled to throw the debt upon the general estate So in *Blount v Hephins* (z), a legatee of railway shares, to which the testator was an original subscriber, was held to have a right to be indemnified against future calls out of the testator's personal estate (z), and the same rule was followed in another case under similar circumstances,

(s) *Exp Earl Digby*, Jac 235, 238

(t) *Ibid*, *Schofield v Lockwood*, 4 De G J & S 28

(u) See Chap XX, ante, pp. 351 et

seq

(x) See post, p 769

(y) *Knight v. Davis*, 3 My & K 358.

(z) 7 Sim 43, 51, *Day v Day*, 1 Dr. & S 261, *Re Box's Trust*, 3 N R 65, *Clive v Clive*, Kay, 600; *Barr v Harding*, 1 J & L 490, *Moffatt v Bates*, 3 Sm & G 468 But see *Armstrong v Burnet*, 20 Bear. 424

and was also applied to a legacy of railway shares to which the testator had not originally subscribed, but which he had purchased from an original subscriber before the Railway Act passed, on the ground that there was an implied contract to indemnify the vendor of the shares against the future calls (*a*)

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In a bequest of money, after payment of debts, to A, and of all other property to B, the money was held to be the primary fund (*b*)

Bequest of fund after payment of debts

As Locke King's Act and the amending Acts apply only to real estate and chattels real, if a testator mortgages or pledges chattels personal, they must still be redeemed for a specific legatee at the expense of the general assets (*c*)

SECTION II

ALTERATION OF THE LAW BY LOCKE KING'S ACT AND THE AMENDING ACTS

i.—Mortgage Debt primarily payable out of mortgaged Lands.— By sect 1 of the statute commonly known as Locke King's Act (*d*), it is enacted as follows —

Locke King's Act

“When any person shall, after the 31st day of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the lands or hereditaments so charged shall as between the different persons claiming through or under the deceased person be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof Provided always, that nothing herein contained shall affect or diminish any right of the mort-

Heir or devisee not to claim payment of mortgage out of personal assets

(*a*) *Jacques v Chambers*, 16 L J Ch 243

(*b*) *Vernon v. Earl Manners*, 31 Beav 623

(*c*) *Lewis v Lewis*, L R 13 Eq 226, *Bothamley v Sherson*, L R 20 Eq 314

(*d*) 17 & 18 Vict c 113

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Act not to
affect rights
under wills,
&c., made
before 1st
Jan., 1855

gagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise. Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the 1st day of January, 1855."

Extent of Act.

It will be observed that this Act applies only to mortgages of land or other hereditaments; it applies to copyholds (*e*); but was held not to apply to leaseholds (*f*); but leaseholds have been included within its operation by the statute hereafter referred to (*g*). Mortgages of personalty other than leaseholds are still subject to the former law, so that the legatee of the particular mortgaged property is entitled to have it exonerated out of the general assets (*h*).

Mortgage by
deposit of
deeds

The word "mortgage" only is used in the Act, and this expression has been held to include an equitable mortgage by deposit of deeds with or without a memorandum (*i*), and though the deposit be expressly "by way of collateral security for money lent on a promissory note" (*k*).

Act applies
only to speci-
fic charges

But the expression included only specific charges (*l*), and accordingly the Act was held not to apply to a general charge by will on real estate (*m*), and this decision does not appear to be affected by the amending Acts.

Trusts for
conversion.

So, also, land devised upon trust for conversion where the legatee took the interest as money, not as land, is not within Locke King's Act (*n*), nor was the lien of a vendor for unpaid purchase-money (*o*).

Vendor's lien

Questions
arising under
the Act

Numerous questions also arose, some of which occasioned conflict of judicial opinion, as to what was a sufficient indication of "contrary intention" so as to exclude the operation of the Act, and, in particular, as to whether a general direction for payment of debts out of the personal estate was sufficient for that purpose (*p*).

(*e*) *Piper v Piper*, 1 J & H 91

(*f*) *Solomon v Solomon*, 33 L J Ch 473, *Womlesley's Estate*, 4 Ch D 665

(*g*) 40 & 41 Vict c 34, s 1, set out *infra*. See *Re Kershaw, Drake v Kershaw*, 37 Ch D. 674

(*h*) See *ante*, pp 753 *et seq.*

(*i*) *Pembroke v Friend*, 1 J & H 132, *Coleby v Coleby*, L R 2 Eq 803.

(*k*) *Ibid*. And see *Davis v Davis*, W N (1876) 242

(*l*) *Re Dunlop, Dunlop v Dunlop*, 21 Ch D 583, 590, C A

(*m*) *Hepworth v Hull*, 30 Beav 476

(*n*) *Lewis v Lewis*, L R 13 Eq 218

(*o*) *Hood v Hood*, 30 L J Ch 616; *Barnewell v Hemminger*, 1 Dr & S. 255 But see *inf*

(*p*) *E g*, cf *Eno v Taiham*, 3 De G J & S 443, 1 N R. 529, and *Woolstencroft v Woolstencroft*, 2 De G. F & J 347

Moreover, contrary intention so as to exclude the operation of this Act was held to be sufficiently indicated by a gift of residue of real and personal estate (*q*), or of personal estate (*r*) upon trust for, or charged with the payment of the testator's debts, without express mention of mortgage debts

In order to solve these difficulties, two Acts were successively passed by the legislature, by the first (*s*) of which it is enacted as follows :—

Sect 1 "In the construction of a will of any person who may die after the 31st day of December, 1867, a general direction that the debts, or that all the debts, of the testator (*t*) shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act (*u*), unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate "

In construing wills, general direction for payment of debts out of personalty not to include mortgage debts, unless intention expressly implied Interpretation of word "mortgage "

Sect 2 "In the construction of the said Act and of this Act the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator " (*x*)

The second of the amending Acts (*y*), above referred to, enacts as follows .—

Sect 1. "The Acts (*z*) mentioned in the schedule hereto shall, as to any testator or intestate dying after the 31st day of December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage or any other equitable charge, including any lien for unpaid purchase-money, and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall, within the meaning of the said Acts, have signified a contrary intention, and such contrary intention shall not be deemed to be signified by a charge of or a direction for payment of debts upon or out of residuary real or personal estate or residuary real estate."

Application of Acts in schedule to lands of any tenure

(*q*) *Stone v Parker*, 1 Dr & Sm 212, *Allen v Allen*, 30 Beav 395; *Newman v Wilson*, 31 Beav 33, *Re Nevill, Robinson v Nevill*, W N (1890) 125

(*r*) *Smith v Smith*, 3 Giff 263, *Mellish v Vallins*, 2 J & H 194, *Eno v Tatham*, 3 De G J & S 451, *Moore v Moore*, 1 De G J & S 602, overruling *Rowson v Harrison*, 31 Beav 207

(*s*) 30 & 31 Vict c 69.

(*t*) "Intestates" are omitted from this Act, but the omission was remedied in the next mentioned Act See *Harding v Harding*, L. R 13 Eq 493

(*u*) 17 & 18 Vict c 113, *sup*

(*x*) As to vendor's lien, see *Re Cochrane*, *Broadbent v Groves*, 24 Ch D 94

(*y*) 40 & 41 Vict c 34

(*z*) 17 & 18 Vict c 113, and 30 & 31 Vict. c 69, *sup*.

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General effect
of the Acts

Considering these Acts as a whole, it will be seen that their effect, in cases to which they apply, is to altogether reverse the former law as to the exoneration of mortgaged estates, and to throw upon the devisee of a deceased mortgagor who seeks to lease mortgaged lands of any tenure exonerated out of the assets, the burden of showing that the mortgagor has by his will sufficiently indicated an intention to exclude the operation of the Acts. A mortgaged estate devolving upon the heir of an intestate mortgagor can in no case be exonerated under these Acts.

Personal liability
not imposed on heir
or devisee

The Acts do not impose any personal liability in respect of the mortgage debt upon the heir or devisee of the mortgaged estate, but merely prevent him, in the absence of expressions of contrary intention, from being entitled to call upon the personal representatives of the intestate or testator to pay off the mortgaged debt (*a*).

Mortgage
comprising
realty and
personalty

Where real and personal estate are comprised in the same mortgage, there is nothing in Locke King's Act or the amending Acts which throws the liability to pay the whole debt upon the realty in exoneration of the personalty; in such a case the mortgage debt must, as between the heir or devisee of the realty and the personal representatives of the mortgagor, be borne rateably according to the value of the respective properties at his death (*b*), unless, on the construction of the instrument of charge, it appears that one or other of the properties should be primarily charged (*c*). And a similar rule applies where two separate real estates are comprised in the same mortgage (*d*).

Persons
claiming
through
deceased

In Locke King's Act, the words "as between the different persons claiming through or under the deceased person," include the Crown claiming personalty on an intestacy in default of next of kin of deceased mortgagor. So, where a person made his will, in 1858, devising real estate which was subject to a mortgage, and disposing of his personalty upon trusts which failed, and died leaving a widow, but no next of kin, it was held that the executors took the personalty as trustees for the widow and the Crown in moieties, and that the devisee was not entitled to have any part of the personalty applied in discharge of the mortgage (*e*).

(*a*) *Syer v Gladstone*, 30 Ch D 614, 616

(*b*) *Trestar v Mason*, 7 Ch D 655, *Re Newmarch, Newmarch v Storr*, 9 Ch D 12, C A, *Leonino v Leonino*, 10 Ch D 460

(*c*) *Lipscomb v Lipscomb*, L. R. 7 Ex. 502

(*d*) *De Rochefort v. Dewes*, L. R. 12 Eq 502

(*e*) *Deare v. Paterson*, 1 Dr. & S. 182

The clause at the end of sect 1 of Locke King's Act saving the rights of persons claiming under or by virtue of any will, deed or document made before the 1st of January, 1855, seems, as regards wills so made, to make them speak from the date of execution and not from the death of the testator for the purpose of excluding the operation of the Act. The Act does not apply to any will made before the Act, though republished after the Act (f).

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Saving clause

This latter proviso does not apply to the heir of a mortgagor who had executed the mortgage before January 1st, 1855 (g), nor to an heir claiming a lapsed devise, as he does not claim under the will (h).

The words in the Act of 1877 (i), "by way of mortgage or any other equitable charge," extend the operation of Locke King's Act, and of the Act of 1867, to a judgment affecting land devised as being of the nature of an equitable charge, so that the devisee is not entitled to have the land exonerated out of the personal estate from the judgment debt (k).

Application of the Acts to judgment debts.

In any cases which may arise under the former law, and also in any cases coming under Locke King's Act and the amending Acts, where either a will contains a sufficient indication of intention to exclude the operation of the Acts, or where the value of the mortgaged land is insufficient for the payment of the mortgage moneys in full, the mortgagee will be entitled to claim payment out of the general assets of the deceased mortgagor in a due course of administration.

For an examination of the law as to the order of administration of assets, and as to marshalling of assets, reference should be made to the text books dealing with the duties of executors and administrators with regard to these matters.

ii.—Contrary Intention.—The Acts do not prescribe any particular mode of signifying contrary intention so as to exclude the operation of the present rule. The intention must be collected from the will or other document taken as a whole; and for this purpose the manner in which the mortgaged estate is disposed of is material.

What will amount to sufficient indication of intention.

(f) *Roife v Perry*, 3 De G J & S. 481

(g) *Piper v Piper*, 1 J & H 91. See *Power v Power*, 8 Ir Ch. 340

(h) *Nelson v Page*, L R 7 Eq 25

(i) 40 & 41 Vict c 34, sup

(k) *Re Anthony, Anthony v Anthony*, (1892) 1 Ch. 450

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Settlement
Devise on
trust for sale

Limitations in strict settlement *per se* are not sufficient (*l*)

In one case (*m*) where lands subject to a mortgage were devised on trust for sale, the Court laid stress on the fact that the proceeds of sale were disposed of in detail after payment of costs, but not alluding to the mortgage, and accordingly held that the mortgaged estate must be exonerated out of the personalty

Mixed fund

A direction to pay all debts out of a mixed fund from real and personal estate does not show a contrary intention within the meaning of these Acts (*n*)

Heritable
bond

A Scotch heritable bond was held, under Locke King's Act, to be included in a direction to pay all just debts (*o*) But it was also held that a direction to pay "debts" included "mortgage debts" within the meaning of that Act (*p*).

Meaning of
"debts"

By the Act of 1867 (*q*) the word "debts" does not include mortgage debts, unless there are express words showing an intention that it should do so, and this applies to a direction to pay debts out of real estate as well as out of personalty (*r*).

Direction to
pay debts out
of personalty
in exoneration
of realty

A direction to pay all debts and funeral expenses out of the personalty in "exoneration" of the real estate is not sufficient. There must be words referring to mortgage debts either expressly (*s*) or by necessary implication

So, where a testator devised his business premises to his son subject to and charged in exoneration of the rest of his estate with his business debts, and devised and bequeathed all the residue of his real and personal estate to trustees upon trust for sale and conversion, and for payment out of the proceeds of his debts other than those thereinbefore provided for, and subject thereto upon specified trusts, it was held that the will sufficiently indicated an intention that all the testator's private debts, including debts secured by mortgages on the property specifically devised to the son, should be paid out of the residuary estate in exoneration of such property (*t*)

(*l*) *Pembroke v Friend*, 1 J & H 134, *Coot v. Lowndes*, L R 10 Eq. 376

(*m*) *Eno v Tatham*, 3 De G J. & S 443

(*n*) *Gall v Fenwick*, 43 L J Ch 178, *Elliot v Dearsley*, 16 Ch D 322, C A

(*o*) *Maxwell v Maxwell*, L R 4 H L 506 But see *Smith v. Moreton*, 37 L J Ch 6

(*p*) *Woolstenecroft v Woolstenecroft* 2

son, 31 Beav 207, *Brownson v Lawrence*, L R 6 Eq 1 See *Sackville v. Smyth*, L R 17 Eq 153

(*q*) 30 & 31 Vict c 69, *ante*, p 769

(*r*) *Re Newmarch, Newmarch v Storr*, 9 Ch D 12, C A

(*s*) *Re Rossiter, Rossiter v Rossiter*, 13 Ch D 355 See *Nelson v Page*, L R 7 Eq 25, *Leonino v Leonino*, 10 Ch D 460

(*t*) *Re Nevill, Robinson v Nevill*, W N (1890) 195

Again, where a testator directed his private debts to be paid out of a specified fund, and after devising his real estate to certain persons and giving certain legacies, he bequeathed his residuary personalty to trustees, subject to the payment of his trade debts, it was held that there was a sufficient indication of contrary intention to entitle the devisees to have the real estate exonerated out of the residuary personalty from an equitable charge made by the testator to his bankers to secure an overdrawn trade account (u)

A direction to pay off any incumbrance on a particular property, which is not subject to any incumbrance at the testator's death, does not raise any implication of intention to exonerate out of his general personal estate other properties which are subject to incumbrances at his death (v)

A specific devise of part of the mortgaged premises, leaving the other part to fall into the residue, does not show a contrary intention (x). Partial devise

A specific devise to a person "absolutely" of land, part of the testator's realty which is subject to a mortgage, coupled with a direction to executors to pay legacies out of personalty, is not a sufficient indication of a "contrary intention" (y). Devise to A "absolutely."

A charge of debts on personalty and on residuary realty, or a specified part of realty, or on residuary realty in aid of personalty, does not sufficiently indicate an intention to exonerate the mortgaged property (z). Charge on personalty and realty.

Where the contrary intention is shown by the substitution of a specific fund, it has been held that the Acts are excluded only to the extent of the substituted fund, so that if that fund proves insufficient, the right to exoneration is exhausted and the liability reverts to the mortgaged land (a)

(u) *Re Fleck, Colston v Roberts*, 37 Ch D 677

(v) *Re Bull, Catty v Bull*, 49 L T. 592

(x) *Sackville v Smyth*, L R 17 Eq 153, questioning *Brownson v Laverance*, L R 6 Eq 1. And see *Gibbins v Eyden*, L R 7 Eq 371, *Lewis v Lewis*, L R 13 Eq 218.

(y) *Re Smith, Hannington v True*, 33

Ch D 195.

(z) *Lewis v Lewis*, *sup*, *Sackville v Smyth*, *sup*, *Re Newmarch, Newmarch v Storr*, 9 Ch D 12

(a) *Per Kindersley, V-C*, in *Redhouse v Mold*, 35 L J Ch 67. But *Romilly, M R*, without deciding the point, seems to have been of a contrary opinion in *Allen v Allen*, 30 Beav 403



SECTION III.

OF CONTRIBUTION BETWEEN SEVERAL OWNERS OF THE EQUITY
OF REDEMPTION, AND THOSE CLAIMING UNDER THEMStatement of
rule

Where several estates subject to the same mortgage either originally belong to, or subsequently become the property of different owners, and one of such owners pays off the debt, he has the right to call upon the owners of the other estates to contribute rateably to the payment of the debt, according to a valuation of the several estates taking into account any other incumbrances affecting them respectively (*b*). This rule will apply in cases where the mortgaged estates of a deceased person are primarily liable to satisfy the debt under Locke King's Act and the amending Acts, and also in cases not within those Acts, where the personalty of the deceased mortgagor is not sufficient to pay the debt in full

Devise of
general
estates to
different
persons

Where different estates in mortgage are devised to different persons, each devisee, either primarily, or on a deficiency of assets, takes his estate *cum onere* (*c*). But the rule is otherwise where all the estates were by the will charged with the payment of debts. So, in *Carter v. Barnardiston* (*d*), it was held that if one seised of Whiteacre and Blackacre mortgage the former, and then by his will devise Whiteacre to A, and Blackacre to B, the devisee of the former shall compel the latter to contribute.

On the like principle, if several estates are comprised in the same mortgage, and are devised to several persons, they must all contribute; so also if the estates in mortgage were freehold and copyhold respectively, and descended to different heirs (*e*)

Devise of
several estates
to same
person

The principle of contribution does not apply where several estates, subject to a mortgage, are devised to the same person so as to entitle the person claiming one of the estates under him to throw the mortgage debt, or any part of it, upon the other estates which have been devised to or devolved upon different persons. The question whether he is so entitled must depend not upon any

(*b*) *Alldrich v. Cooper*, 8 Ves 390, *Clarke v. Brereton*, 1 Jo. 165, *Johnson v. Child*, 4 Ha. 87

(*c*) *Hallswell v. Tanner*, 1 R. & My. 633, *Symons v. James*, 2 Y. & C. C. C. 301

(*d*) 1 P. Wms 506. See *Irvine v. Ironmonger*, 2 R. & My 531; *Middleton v. Middleton*, 15 Beav 450, *Barnes v. Raoster*, 1 Y. & C. C. C. 401

(*e*) *Alldrich v. Cooper*, 8 Ves 390.

right arising under the will creating the title of the original devisee, but upon the right, if any there be, arising upon the instrument creating the title of the person claiming under the devisee (f).

Before a case of contribution can arise, the several estates must have been liable to one common demand. Thus where A, the first mortgagee of Whiteacre, and B, the first mortgagee of Blackacre, joined in a mortgage of both estates and consented to give to the subsequent mortgagee priority over their respective charges; and the lands were subsequently sold, and the subsequent mortgage was paid off out of the proceeds of sale of both properties; the surplus proceeds of sale of Whiteacre were not sufficient to pay off the mortgage upon it; it was held that A was not entitled to contribution against B, there not having been any common liability to pay a common demand (g).

Moreover, the several estates must be liable equally, and not one as surety or collateral security for the other, and be a common fund (h).

Thus, where under Locke King's Act (i) land is specifically charged with a debt, which is also generally charged on shares of a company by a provision of the Act of Settlement, there is no contribution, because there is no common fund (k).

In a case arising under the former law before Locke King's Act, where a person possessed of several leasehold estates mortgaged one of them, and then, by his will, bequeathed them separately to different parties, and directed his debts to be paid out of his residuary personal estate, and such residuary estate proved insufficient for the purpose, it was held that the legatee of the mortgaged estate must take it *cum onere*, and could not call on the other legatees to contribute (l).

But where several estates subject to distinct mortgages were specifically devised to different persons, and the testator directed that the mortgages should be discharged out of the personal estate, so that the devisees might hold the estates freed therefrom, and there proved to be a deficiency of personal assets for payment of the mortgage and other debts, a decree was made

(f) *Stronge v Hawkes*, 4 De G. & J 632, at p 654.

(g) *Re Keily*, 9 Ir Ch R. 87.

(h) *Marg of Bute v Cunynghame*, 2 Russ. 275, 299, *Averall v Wade*, 11 & G t Sug. 252, *Re Dunlop*, 21 Ch D.

592, C A.

(i) 17 & 18 Vict c 113.

(k) *Re Dunlop*, *sup*.

(l) *Hallwell v Tanner*, 1 R. & My 633, *Emus v Smith*, 2 De G & S 736.

CHAP XL

that the mortgage and other specialty debts should first be paid out of the personal assets *pro ratâ*, that the residue of the mortgage debts should be borne by the respective estates on which they were charged, and that the deficiency of the other specialty debts, and the simple contract debts, should be borne by the several devised estates, and the specific legacies, *pro ratâ* (m). By this decree, though it made the mortgaged estates pay each its own debt as against other creditors, yet the specific devisees of the land were in part preferred to the specific legatees. It may deserve consideration whether such weight should have been attributed to the direction in the will that the mortgages should be discharged out of the personal estate, since that is not more than the law would then have implied.

In a case where a testator devised his freehold and copyhold and leasehold estates to his seven children in equal shares, charged with payment of his debts, and bequeathed his personal estate to A, exonerated from his debts, and declared that the freeholds and copyholds should be the primary fund, and the leaseholds the secondary fund, for payment of the debts, and one of the children died in his lifetime, it was held that one-seventh share of the freeholds and other estates, after payment of the debts charged thereon, lapsed to the heir-at-law and next of kin respectively, and that the devisees of the other six shares were not entitled to have the lapsed share applied in exoneration of the devised shares (n).

By this rule, also, where legacies are charged on two mortgaged estates, one of which is of sufficient value to pay its mortgage and also the legacies, the mortgagee of the other can compel the assignees of the bankrupt mortgagor to discharge the legacies out of the proceeds of sale of the first, or stand in the place of the legatees (o).

(m) *Symons v James*, 2 Y & C C C 301.

(n) *Fisher v. Fisher*, 2 Keen, 610, the marginal note is inaccurate
(o) *Exp Hartley*, 2 M & A 496

CHAPTER XLI.

OF MARSHALLING OF MORTGAGED ASSETS.

i.—Nature and Effect of the Doctrine of Marshalling as applied to Mortgages—The general rule of equity is, that a person having two funds to which he may resort, shall not disappoint another person who can resort to one only of the funds (*a*). If, therefore, a creditor has a claim upon two funds, and another creditor has a claim upon one only of those funds, the Court will marshal the funds, without regard to the interests of the debtor, so as to satisfy the claim of the creditor having both funds, out of that fund which, paying him, will leave the other fund for the other creditor (*b*). The doctrine of marshalling applies not only in the administration of assets of a deceased person, but also in the appropriation of particular funds at any time, either during the life or after the death of a debtor, in satisfaction of claims arising under successive charges or interests to which the several funds are subject

Statement of
the doctrine

The leading case upon the doctrine of marshalling is that of *Aldrich v Cooper* (*c*), in which it was contended on the authority of *Robinson v Tonge* (*d*), that specialty creditors had no right to insist that a mortgage debt, secured both on freeholds and copyholds, should be thrown on the copyholds, so as to leave the specialty creditors the freehold fund, on the ground that copyholds (the case being prior to the 3 & 4 Will. IV. c. 104) were not assets for specialty debts, and that none of the rules of equity subject any fund to a claim to which it was not before subject, but only take care that the election of one claimant shall

*Aldrich v
Cooper*

(*a*) *Aldrich v Cooper*, 8 Ves 382, 891. And see notes to *S. C.* in Wh & Tud L C Eq., vol. II pp 109 *et seq*. See also *Trimmer v Bayne*, 9 Ves 209, *Gibson v Seagrim*, 20 Beav 614, *Tidd v. Lister*, 3 De G. M. & G 857.

(*b*) *Att.-Gen v Tindall*, Amb 619
(*c*) 8 Ves 382. And see *Gwynne v. Edwards*, 2 Russ. 289, note, *Greenwood v Taylor*, 1 R. & My 187
(*d*) Stated in Mr Cox's note to 1 P. Wms 680.

CHAP. XLII

not prejudice the claims of others Lord Eldon justly observed that it was clear the case was by no means a due application of the principle, for the copyholds, as well as the freeholds, were both subject to the mortgage debt; and as to copyholds not being assets for specialty debts, was freehold estate, he asked, assets for simple contract debts? which, at that time, it was not, either in law or equity Upon what principle, then, did the Court say that in given cases simple contract debts should be paid out of the real estate? Not upon the ground of assets, but that a specialty creditor had a double fund to resort to. Upon the like principle, the Court, in that case, directed (if it were necessary for the payment of the creditors) that the mortgagee should take his satisfaction out of the copyhold estate, and that if he took it out of the freehold, those who were thereby disappointed should stand in his place as to the copyhold estate; thereby overruling *Robinson v. Tonge* The reader will, of course, bear in mind that this reasoning has in a great measure become inapplicable since the passing of the statute above referred to

Application
of the doctrine
to cases of
mortgage

The doctrine of marshalling, in relation to mortgages, results in the general rule that where an owner of several properties has mortgaged them to the same person and afterwards deals separately with the equity of redemption in one or more of those properties either by way of mortgage or otherwise, the person or persons interested in the equities of redemption so dealt with are entitled, as against the mortgagor, to require that the first mortgage shall be paid off in the first place out of the property not so dealt with, or, if that mortgage is paid off out of the property in which they are so interested, to stand *pro tanto* in the place of the first mortgagee in regard to the property which has not been resorted to for satisfying his security

Rights of
first mort-
gagee not
interfered
with

In applying the doctrine of marshalling, the Court will not restrain a prior mortgagee from satisfying his debt out of available property comprised in his mortgage, which is subject to a subsequent incumbrance, merely because his security comprises other property which is not so subject, he has a right to take the money that is realised by any of his securities which comes first to hand (e).

Right of
junior as-

If, however, a prior mortgagee realizes several properties

(e) *Wells v. Woodyear*, 2 Jur. N. S. 179.

comprised in his security he will not be allowed to satisfy his debt out of one of those properties over which another person has a claim as mortgagee or otherwise, in exoneration of the proceeds of sale of other properties which are not subject to such a claim. So a second mortgagee will be entitled to the extent of the value comprised in his security to have the balance of the moneys received by the first mortgagee in respect of all the securities realized by him, after satisfying his mortgage debt, applied in or towards satisfaction of the second mortgage, and the first mortgagee will be deemed to be a trustee of such balance for the second mortgagee, and if he refuses to account for and apply the moneys received by him on that footing, he will be liable to the costs of proceedings to compel him to do so (*f*)

CHAP. XII
signee where
first mort-
gagee realizes
all his secu-
rities

If the prior mortgagee of several properties realizes property which is subject to a subsequent incumbrance, instead of property which is not so subject, and satisfies his debt out of the proceeds of the property realized, the subsequent incumbrancer will be entitled to stand in the place of the prior mortgagee as regards the property to which the latter has not resorted, so that the payment of both claims may as far as possible be worked out (*g*). This rule will apply where the only one of two funds to which a subsequent incumbrancer could resort has been applied in payment of the prior mortgage by order of the Court for convenience of administration (*h*).

Where first
mortgagee
realizes secu-
rity which is
subject to
second mort-
gage

So, where an executor was mortgagee of real estate of the testator, and also a legatee under the will, it was held that he was not bound to satisfy the mortgage debt out of the first assets which came into his hands on the ground that on his so doing the right of marshalling would arise so as to entitle the other legatees to go *pro tanto* against the real estate (*i*).

This equity has been applied in favour of a mortgagee whose interest in an estate was affected by an extent of the Crown; and he was held entitled to stand in the place of the Crown as to those securities which he could not affect directly because the Crown had affected them (*k*).

Marshalling
in case of
extent by the
Crown

Where a mortgagee of chattels has left the mortgagor in possession without fraud, and the landlord distrains those, as

Distress for
rent

(*f*) *South v. Bloxom*, 2 H. & M. 457
For forms of order, see Seton, p. 1738.

(*g*) *Trimmer v. Bayne*, 9 Ves. 209

(*h*) *Gwynne v. Edwards*, 2 Russ.

289, n

(*i*) *Bunns v. Nichols*, L. R. 2 Eq

256

(*k*) *Sagitary v. Hyde*, 1 Vern. 455.

CHAP. XLII.

well as other chattels belonging to the mortgagor absolutely, and sells some of each kind, and the mortgagor then becomes bankrupt, the mortgagee is entitled, as against the assignees in bankruptcy, to have the chattels marshalled (*l*)

Paraphernalia
of widow

So, in a case under the old law, whereby personalty was primarily liable for payment of a mortgage debt in exoneration of mortgaged realty, it was said that if the mortgagee took the paraphernalia of a widow in satisfaction of his debt she would be entitled in equity to stand in place of the mortgagee, and to take as much out of the realty as should be equivalent to the value of the paraphernalia taken by the mortgagee (*m*)

This general rule may be enforced where the equities of redemption subject to the first mortgage have descended upon different persons (*n*)

Bankruptcy
does not pre-
vent marshal-
ling

The bankruptcy of the debtor will not prevent the application of the rule, for the trustee in the bankruptcy stands in the place of the bankrupt. So, where a trader mortgaged certain real estate and policies of assurance to one person, and afterwards mortgaged the estate alone to another person, and subsequently became bankrupt, it was held that the second mortgagee was entitled to have the policy moneys applied in the first instance in payment of the debt due to the first mortgagee (*o*).

Husband and
wife

Where a husband and wife together mortgaged freeholds and copyholds belonging to the wife, the mortgagor was held to be entitled, after the husband's death, to marshal as against the wife surviving, and to require that the first mortgage should be paid off primarily out of the copyholds so far as they would extend (*p*)

Fee simple
reduced to
life estate

It is not clear whether the principle of marshalling applies between two interests, where the owner of a fee simple subject to a mortgage reduces his interest to a life estate, and then mortgages his life estate (*q*)

Effect of

It would seem that the doctrine of marshalling will apply

(*l*) *Exp. Stephenson*, De G 586, 589.
See *Broadbent v Barlow*, 3 De G F & J 570

(*m*) *Tipping v Tipping*, 1 P. Wms 729.

(*n*) *Lanoy v. Duke of Athol*, 2 Atk 444. See *Re Jones, Farrington v Forester*, (1893) 2 Ch 461

(*o*) *Baldwin v Belcher*, 3 Dr & War. 173 See also *Hughes v Williams*, 3 Mac & G 683, 690, *Gibson v Seagram*, 20 Beav 614, *Heyman v Dubois*, L R 13 Eq 158

(*p*) *Tidd v Lister*, 3 De G M & G 857

(*q*) *Dolphin v. Aylward*, L R. 4 H. L 486, 502.

notwithstanding that the result will be to defeat a restraint on anticipation. So, where a woman entitled under a will to a life interest without power of anticipation in one fund, and to an unrestricted life interest in another fund, during widowhood mortgaged her life interest and certain policies of assurance on her life to secure an advance; and, having married again, she charged her life interests in favour of a subsequent mortgagee, it was held that the doctrine of marshalling applied in favour of the second mortgagee, and that the interest on the first mortgage must be primarily kept down out of the income, which was subject to the restraint on anticipation (*r*)

CHAP. XLV
restraint on
anticipation

The right of a subsequent incumbrancer to insist, under the doctrine of marshalling, that the debt of the first mortgagee shall be satisfied out of the property not subject to the *pursne* incumbrancer, may be enforced though the instrument creating the second charge does not contain any covenant or statement that the property comprised therein is free from incumbrances (*s*); but a covenant or statement to that effect may strengthen the position of the *pursne* incumbrancer by working in aid, as against the mortgagor, the principle of equity that what has been agreed upon, and ought to be done, shall so far as possible be specifically enforced (*t*)

Covenant
against in-
cumbrances

So, where a mortgagor settled part of the mortgaged lands and other lands not in mortgage, and the settlement did not recite that any incumbrances existed, but contained a covenant against incumbrances, it was held that as between the tenant in tail under the settlement and the settlor the settled estates must be deemed to be exonerated from the mortgage so as to throw it wholly on the unsettled estates, and that a subsequent judgment creditor and the assignees in insolvency of the settlor were subject to the same equities as the settlor himself (*u*). But the principle of this decision would clearly not be applied to the prejudice of a subsequent *bonâ fide* incumbrancer or purchaser without notice (*x*).

Where a person was owner of two estates charged with debts, and mortgaged one of them, and the mortgage deed recited

Erroneous
recital that
debts are
paid

(*r*) *Re Loder*, W. N. (1886) 166

(*s*) *Hales v. Cox*, 32 Beav. 118

(*t*) *Averall v. Wade*, L. L. & G. t
Sug. 252, at p. 260

(*u*) *Hughes v. Williams*, 3 Mac. & G.
683, *Chappell v. Rees*, 1 De G. M. &
G. 393

(*v*) *Barnes v. Ruster*, 1 Y. & C. C. C.

CHAP. XLI

well as other chattels belonging to the mortgagor absolutely, and sells some of each kind, and the mortgagor then becomes bankrupt, the mortgagee is entitled, as against the assignees in bankruptcy, to have the chattels marshalled (*l*)

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life estate

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(*l*) *Ex p. Stephenson*, De G. 586, 589. See *Broadbent v. Barlow*, 3 De G. F. & J. 570.

(*m*) *Typing v. Typing*, 1 P. Wms 729

(*n*) *Lanoy v. Duke of Athol*, 2 Atk 444. See *Re Jones, Farrington v. Forester*, (1893) 2 Ch. 461

(*o*) *Baldwin v. Belcher*, 3 Dr. & War. 173. See also *Hughes v. Williams*, 3 Mac. & G. 683, 690. *Gibson v. Seagram*, 20 Beav. 614, *Heyman v. Dubois*, L. R. 13 Eq. 158

(*p*) *Tridd v. Lister*, 3 De G. M. & G. 857

(*q*) *Dolphin v. Ayward*, L. R. 4 H. L. 486, 502

notwithstanding that the result will be to defeat a restraint on anticipation. So, where a woman entitled under a will to a life interest without power of anticipation in one fund, and to an unrestricted life interest in another fund, during widowhood mortgaged her life interest and certain policies of assurance on her life to secure an advance; and, having married again, she charged her life interests in favour of a subsequent mortgagee, it was held that the doctrine of marshalling applied in favour of the second mortgagee, and that the interest on the first mortgage must be primarily kept down out of the income, which was subject to the restraint on anticipation ^(r)

CHAP. XLII
restraint on
anticipation

The right of a subsequent incumbrancer to insist, under the doctrine of marshalling, that the debt of the first mortgagee shall be satisfied out of the property not subject to the *pursne* incumbrancer, may be enforced though the instrument creating the second charge does not contain any covenant or statement that the property comprised therein is free from incumbrances ^(s); but a covenant or statement to that effect may strengthen the position of the *pursne* incumbrancer by working in aid, as against the mortgagor, the principle of equity that what has been agreed upon, and ought to be done, shall so far as possible be specifically enforced ^(t)

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against in-
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So, where a mortgagor settled part of the mortgaged lands and other lands not in mortgage, and the settlement did not recite that any incumbrances existed, but contained a covenant against incumbrances, it was held that as between the tenant in tail under the settlement and the settlor the settled estates must be deemed to be exonerated from the mortgage so as to throw it wholly on the unsettled estates, and that a subsequent judgment creditor and the assignees in insolvency of the settlor were subject to the same equities as the settlor himself ^(u). But the principle of this decision would clearly not be applied to the prejudice of a subsequent *bond fide* incumbrancer or purchaser without notice ^(x)

Where a person was owner of two estates charged with debts, and mortgaged one of them, and the mortgage deed recited

Erroneous
recital that
debts are
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^(r) *Re Loder*, W N (1886) 166.

^(s) *Hales v. Cox*, 32 Beav 118

^(t) *Averall v Wade*, Ll & G. t Sug 252, at p 260

^(u) *Hughes v Williams*, 3 Mac & G 683, *Chappell v Rees*, 1 De G M & G 393

^(x) *Barnes v Racster*, 1 Y & C C C 401

CHAP. XLII

(though erroneously) that the debts were paid, and contained a covenant against incumbrances, it was held that the mortgagor was bound to indemnify the mortgaged estate from such debts out of the other estate; but it was said that whether the other estate would be charged with such debts and bound by such covenant in the hands of a subsequent mortgagee thereof would depend upon many considerations of notice or otherwise (y).

But in such a case a covenant against incumbrances contained in a mortgage by way of appointment will not be enforceable by a subsequent mortgagee so as to entitle him to have the estate comprised in his mortgage exonerated from the charge of debts as against subsequent mortgagees claiming under the same powers (z).

Claim to
marshal need
not be
pleaded

The right to marshal may be claimed at the hearing of the action, though not expressly raised by the pleadings. If the Court sees at any period that a creditor, having only one fund, will be deprived of his debt by a creditor who has also another fund, going against the former fund, the Court will of itself, without being called upon, direct the assets to be marshalled (a).

Rule between
first mort-
gagee of
several estates
and *pursue*
mortgagee of
one estate

ii.—In Favour of what Persons the Right of Marshalling arises.—The rule as between one mortgagee of several estates and a subsequent mortgagee of one of them is thus laid down by Lord Hardwicke, C, in *Lanoy v. Duke of Athol* (b):—Suppose a person who has two real estates, mortgages both of them to one person, and afterwards only one estate to a second mortgagee who had no notice of the first, the Courts, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage in order to make room for the second mortgagee, even though the estates descended to two different persons.

Notice immaterial

It is to be observed, however, with regard to this statement of the rule, that it is now immaterial whether the second mortgagee had notice of the first mortgage or not (c).

(y) *Stronge v. Hawkes*, 4 De G. & J 622, 651

(z) *Ibid.*

(a) *Griggs v. Ougter*, 12 Ves. 413, 416.

(b) 2 Atk. 444

(c) See *Baldwin v. Belcher*, 3 Dr. & War 176, *Hughes v. Williams*, 3 Mac & G 683, *Tradd v. Lister*, 3 De G. M & G 867, *Heyman v. Dubois*, L. R. 13 Eq 158

It may also be remarked that in a recent case, *Sir E Kay, L J*, intimated that Lord Hardwicke, in saying that "the Court would direct the mortgagee to take his satisfaction out of that estate only not in mortgage to the second mortgagee," must be taken to have meant merely that the second mortgagee could, as against the *mortgagor* and those claiming under him, compel the payment of the first mortgage out of the estate on which he had no charge, according to the ordinary doctrine of marshalling (*d*)

CHAP. XLII
Extent of the rule

The right to marshal may arise though the two estates, subject to the first mortgage, do not become so subject at the same time, as, for instance, where lands not comprised in the original mortgage are afterwards mortgaged by way of collateral security for the same debt (*e*)

First charges not simultaneous

The doctrine of marshalling is applied in favour of persons having charges arising otherwise than by way of subsequent mortgage upon one only of the mortgaged properties. So, where a mortgage was made of two estates, and one of them was subsequently settled so as to be subject to a portion, it was held that the person entitled to a portion had the right to require that the estate which was not subject to the portion should be first resorted to in or towards satisfaction of the mortgage (*f*).

Rule applies in favour of persons having charges other than by way of mortgage

So, also, where an advance was made on the security of certain deposited goods, and of a bill of lading of other goods sent to the borrower by the unpaid vendor of the goods comprised therein, it was held that the vendor could compel the deposittee, who had sold all the goods comprised in his securities, to satisfy his claim out of proceeds of sale of the goods not comprised in the bill of lading (*g*)

Vendor's lien

Marshalling may be enforced in favour of an incumbrancer whose charge is merely voluntary (*h*)

Voluntary charge

The doctrine has been extended so as to apply in favour of persons having claims not secured by any charge against part only of the property included in a prior incumbrance.

Other claims on equity of redemption

Where a man made a settlement of real estate and covenanted for quiet enjoyment, and then mortgaged the settled and other unsettled estates, the persons claiming under the settlement,

Volunteers

(*d*) *Flint v Howard*, (1893) 2 Ch 54, at p 73

(*e*) *Gwynne v Edwards*, 2 Russ 289.

(*f*) *Lord Ranelagh v. Parkyns*, 6 Dowl. 216.

(*g*) *Re Westmihus*, 5 B & Ad 817.

(*h*) *Aldridge v. Forbes*, 4 Jur 20.

CHAP. XLII

though voluntary, were entitled to throw the mortgage on the unsettled estates (2)

The principle of marshalling has been held not to apply as between mere volunteers (j)

Surety

A surety is entitled to the benefit of marshalling (k).

Where one of the securities is impeached

Where a person deposited with his bankers, to secure the balance of his current account, an annuity deed together with documents of title relating to other property, it was held, in a suit to set aside the annuity deed, that the plaintiff might require the bankers to first apply in payment of their debt the securities in which the plaintiff had no interest so as to liberate the annuity deed (l). In this case the Court did restrain the creditors from dealing with one of their securities pending the result of the suit, but this was done on the express ground that no injustice would ultimately follow from such restraint.

Rule applies where first charge is not a mortgage

The doctrine also applies where several properties are subject to a charge arising otherwise than by way of mortgage, in favour of a person having a subsequent charge or claim upon one only of such properties.

Jointure

The rule was applied in favour of portions charged on freehold and leasehold estate, subject to the jointure of a wife by settlement, as against the wife, who had the collateral security of a covenant for her jointure, though the copyhold and personal estate, which were affected by the covenant, were bequeathed to her by the settlor absolutely (m)

Portions

So, in a case where estate A was devised to uses, and estate B was devised on trusts to raise portions, and subject thereto in the first instance, and subject to the payment of debts, to the eldest son of the testator in fee, and the debts swallowed up all estate B, it was held that to the amount of the specialty debts (the testator having died before 3 & 4 Will IV c 104) the portionists were entitled to come upon estate A (n). It is submitted whether the testator did not show an equal intention to exempt both the portionists and the devisees of estate A. from the debts, and whether, consequently, a contribution should not have been decreed

(i) *Hughes v Williams*, 3 Mac & G 684, *Hales v Cox*, 32 Beav 118, *Anstey v Newman*, 39 L J Ch 769 But see *Ker v Ker*, 1r R 4 Eq 15

(j) *Boazman v Johnston*, 3 Sim 377. But see *Lomas v Wright*, 2 My. & K. 769.

(k) *Heyman v. Dubois*, 1r R 13 Eq 158

(l) *Duncombe v Davis*, 1 Ha 184, 195

(m) *Lanoy v Duke of Athol*, 2 Atk. 44

(n) *Leach v Leach*. 15 Sim. 135.

Where debts are charged generally on the residuary estate, and the devisee-executor mortgages part of the residuary estate, the mortgagee is entitled to have the assets marshalled so as to throw the debts on the residuary estate not comprised in the mortgage (o). CHAP. XLII
General charge of debts

Where legacies are charged on several estates, one of which is mortgaged subsequently, the mortgagee is entitled to have the legacies raised out of the other estates (p). Charge of legacies.

So, if a devisee of two estates charged with legacies mortgages them separately, and the proceeds of sale of one estate are insufficient to satisfy the legacies and the mortgage debt charged thereon, the mortgagee of that estate may, as against the mortgagor or his trustee in bankruptcy, require the other mortgaged estate to be first resorted to, if sufficient also to satisfy the mortgage on that estate, for payment of the legacies, so as to enable his own mortgage to be satisfied (q).

The rule is further exemplified by the case of a charge of debts on real estate by will, with a gift of pecuniary legacies, in which event, if a creditor exhaust the personalty, the legatee will to that amount be entitled to come on the land (r). So in the case of two legacies, one merely pecuniary, and the other charged on land, there is the like marshalling (s). When legates may marshal

In cases not falling within Locke King's Act (t), so that the personalty is primarily liable to the payment of mortgage debts, the principle of marshalling is applied in favour of creditors (u), and of legatees, whether specific (x) or pecuniary (y), as against a descended mortgage estate, but not as against a specific devisee (z), although the specific devisee be the heir (a), unless the specifically devised estates were charged with the

(o) *Haynes v Forshaw*, 11 Ha 93
(p) *Fench v Shaw*, 5 H L O 905, 2 Jur N S 25.

(q) *Exp Hawley*, 2 M & A 496
(r) *Amb 129*, *Haslewood v Pope*, 3 P Wms 324, 4th point But see *Spong v Spong*, 3 Bl N S 84.

(s) *Hanby v Roberts*, *Amb 127*, *Masters v. Masters*, 1 P. Wms 421, *Bligh v Earl of Darnley*, 2 P. Wms 619

(t) See ante, pp 753 et seq.

(u) *Bartholomew v. May*, 1 Atk 487, *Lomas v Wright*, 2 My & K

769

(x) *O'Neal v Mead*, 1 P Wms 693

(y) *Davis v. Gardener*, 2 P Wms. 190, *Ryder v. Wager*, 2 P. Wms 335, *Wythe v Henneker*, 2 My & K 635, unless the will otherwise directs See *Symons v James*, 2 Y & C. O O 301

(z) *Aldrich v Cooper*, 8 Ves 396, *Hensman v. Fryer*, L. R 3 Ch. A 420

(a) *Strookland v Strookland*, 10 Sim 374

CHAP. XLI

payment of debts (b); nor against a residuary legatee either before (c) or after (d) the Wills Act

Lien

So, where a contract for purchase of real estate is completed after the purchaser's death, and the purchase-money has been paid out of his general estate, a pecuniary legatee will be entitled to marshal against the purchased estate, there being no distinction between a mortgage and the vendor's lien in this respect (e).

Mortgagee of voidable policy of life assurance

The doctrine of marshalling will not be extended so as to entitle a life assurance society to require the mortgagee of a policy which is in terms to be void on suicide of the assured, except to the extent of an assignee's interest, to throw the mortgage debt primarily upon other property included in his security, nor to have it apportioned between the policy moneys and the other property (f).

Mortgage of policy to assurance company

So, also, where an assurance company advanced money on the security of a mortgage of certain real estates and of a policy on the life of the mortgagor effected in its own office in similar terms, and the assured committed suicide, it was held that the company stood in no better position than if the policy had been mortgaged to a third person, and could not be allowed to satisfy their debt out of the real estates to the prejudice of the persons interested therein, and accordingly, the policy money being sufficient to satisfy the debt, the real estates were ordered to be reconveyed free from the mortgage (g).

Doctrine not applied to prejudice of third parties

iii.—**Marshalling not applied to Prejudice of Third Parties.**—The doctrine of marshalling will not be applied to the prejudice of third parties. "The right of a subsequent mortgagee of one of the estates to marshal—that is, to throw the prior charge on both estates upon that which is not mortgaged to him—is an equity which is not enforced against third parties, that is, against any one except the mortgagor and his legal represen-

(b) *Paterson v. Scott*, 1 De G M & G. 531, *Rickard v. Barrett*, 3 K. & J. 289.

(c) *Forrester v. Lee*, Amb. 172, *Scott v. Scott*, Amb. 383

(d) *Collins v. Lewis*, L. R. 8 Eq. 708, *Dugdale v. Dugdale*, L. R. 14 Eq. 234, *Tomkins v. Coldhurst*, 1 Ch. D. 626, *Farquharson v. Floyer*, 3 Ch. D. 109. But see *Hensman v. Fryer*, L. R. 3 Ch. A. 420

(e) *Sprout v. Prior*, 8 Sim. 189, *Birds v. Askey*, 24 Beav. 618, *Lord Lalford v. Powys-Keck*, L. R. 1 Eq. 347.

(f) *Solihors and General Life Assurance Soc. v. Lamb*, 2 De G J & S. 261, *City Bank v. Sovereign Life Assurance Co.*, W. N. (1884) 61.

(g) *White v. British Empire Mutual Life Assurance Co.*, L. R. 7 Eq. 394

tatives, claiming as volunteers under him. It is not enforced against a mortgagee or purchaser of the other estate" (h)

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Thus, the Court will not marshal in favour of a second mortgagee as against a subsequent mortgagee, and, accordingly, where there is a first mortgage over two estates, and then a mortgage on one of the estates, and then a mortgage on the other or on both the estates, this right of marshalling will not be exercised in favour of the second incumbrancer against the third, though with notice of the second incumbrance (i). In such case the first mortgage will be apportioned rateably between the two estates (k); and yet the second incumbrancer, or even a third incumbrancer on the one estate (if lending his money without notice), can oust the *pursne* incumbrancer on the other estate from his security, by subsequently buying in the first mortgage, which covers both estates (l).

Subsequent mortgagees.

In *Averall v. Wade* (m), in Ireland, where, after judgment entered up against the cognisor, he settled one of his two estates on the marriage of his son, with a covenant against incumbrances, Sir Edward Sugden refused to apportion the prior judgment between the settled and unsettled estates, in favour of a subsequent judgment creditor, and threw the whole of such prior judgment upon the unsettled estate, the ground of the distinction being, it seems, that the judgment creditor had not a specific charge

Marshalling between settled and unsettled estates in cases of judgments

The doctrine will not apply in favour of a subsequent mortgagee to the prejudice of volunteers where one of the estates has been conveyed by way of voluntary settlement (n). But volunteers have no right to marshal to the prejudice of a prior settlement (o).

Volunteers

If, however, the third mortgage is expressed to be made subject to and after payment of the prior mortgages, the second mortgagee will be entitled to marshal against the third. So,

(h) *Per Kay, L. J.*, in *Flint v. Howard*, (1893) 2 Ch. 54, at p. 73, C. A.

(i) See *infra*, p. 788

(k) *Barnes v. Racster*, 1 Y. & C. Ex. 401; *Bugden v. Bynold*, 2 Y. & C. Ex. 377; *Re Mower's Trusts*, L. R. 8 Eq. 110; *Trumper v. Trumper*, L. R. 8 Ch. A. 870; *Re Dunlop*, *Dunlop v. Dunlop*, 21 Ch. D. 583, C. A.; *Flint v. Howard*, (1893) 2 Ch. 54, C. A.

(l) See *Bovey v. Skipworth*, 1 Ch. Ca. 201.

(m) *Ll. & G. t. Sug.* 252. See *Hamilton v. Royse*, 2 Sch. & L. 315; *Goring v. Farrall*, Beat. 472; *Lawrance v. Galsworthy*, 3 Jur. N. S. 1049; *Stronge v. Hawkes*, 4 De G. & J. 632; 651; *Re Scott's Estate*, 14 Ir. Ch. R. 63; *Chappell v. Rees*, 1 De G. M. & G. 393; 16 Jur. 415.

(n) *Dolphin v. Aylward*, L. R. 4 H. L. 502.

(o) *Anstey v. Newman*, 39 L. J. Ch. 769.

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where there were three mortgages, the first upon funds A. and B, the second on fund A, and the third upon both funds, but made expressly subject to and after payment and satisfaction of the moneys secured by the prior mortgages, the first mortgagee having exhausted fund A, the second mortgagee was held to be entitled to be paid in full out of fund B. before the third mortgagee (*p*).

Where one has a mortgage upon Blackacre and a collateral charge upon Blackacre and Whiteacre, and takes a subsequent mortgage on Blackacre for a further sum, he can exhaust Whiteacre in satisfying his charge, leaving Blackacre clear for his further mortgage, and cannot be compelled by a *pursne* incumbrancer on Whiteacre to marshal his securities, notwithstanding his further mortgage contains a covenant against incumbrances, except the first mortgage (*q*).

Surety

A surety has no equity to prevent marshalling (*r*).

Two funds,
one subject to
lien, the other
not

On the principle that assets shall not be marshalled where by so doing another person's rights would be prejudiced, the doctrine of marshalling will not apply where there are different funds as to which different rights exist. So, where creditors had a lien upon a fund, and merely a right of set off as to another fund, a person having a subsequent charge on the former fund was held not to be entitled to compel the creditors to retire from their higher right by virtue of their prior lien, and to resort to the fund in respect of which they had only a right of set off (*s*).

Rights of
several mort-
gagees of
distinct funds
subject to
prior mort-
gage

Where Blackacre and Whiteacre are mortgaged together to A., and subsequently Blackacre is mortgaged to B, and Whiteacre is mortgaged to C, there can be no such marshalling as shall prejudice either B or C, but, in such a case, their rights are to require that A's debt shall be satisfied rateably out of the two estates so as to leave a proper proportion thereof respectively to satisfy the claims of B and C, the ultimate surplus arising from both estates being payable to the mortgagor, or those claiming under him (*t*). Where the several equities of redemption become absolutely vested in different persons by purchase,

(*p*) *Re Mower's Trusts*, L. R. 8 Eq. 110.

(*q*) *Re Roddy*, 11 Ir. Ch. R. 369.

(*r*) *South v. Bloom*, 2 H. & M. 457, *Hayman v. Dubois*, L. R. 13 Eq. 169.

(*s*) *Webb v. Smith*, 30 Ch. D. 192, C. A.

(*t*) *Moson v. Berkeley Building Soc.*, 59 L. J. Ch. 524.

devise, devolution, or otherwise, if one of such persons is compelled to satisfy the debt, he will be entitled to require the owner of the other estate to contribute rateably his proportion of the debt (*u*).

iv.—Application of the Doctrine to Maritime Securities.—The doctrine of marshalling is applied in the Admiralty Division of the High Court so far as is consistent with the rules regulating the priorities of maritime securities (*x*).

Where there are several bottomry bonds, one binding the ship, freight, and cargo, and another on the ship and freight only, the Court will marshal the assets, directing the first claim to be satisfied out of the cargo so as not to disappoint the bondholders who have no charge thereon (*y*).

So, where the master of a ship had given bottomry bonds on ship, freight, and cargo, and had also personally bound himself for payment of the bond, it was held that although according to the general rule, the master, by so binding him self, had, in strictness, deprived his lien over ship and freight alone of its priority over the bottomry bonds, yet that as the bondholders had the cargo to fall back upon, and the rule existed only for the protection of bondholders, the assets must be marshalled so as to restore the master's priority and entitle him to be paid in the first place out of the proceeds of the ship and freight, leaving the bondholders to get any balance of their claim, not satisfied out of such proceeds, out of the cargo (*z*).

The equity will not be applied to the prejudice of third persons. So claims for wages and other disbursements to which the ship and freight are liable, will not be ordered to be satisfied out of the freight in favour of the holder of a bond on the ship only to the prejudice of third persons interested in the freight (*a*).

The doctrine of marshalling will not be applied to restrain seamen proceeding against the ship for their wages, instead of proceeding on their personal remedy for the benefit of the holder of a bond on the ship (*b*).